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HANDBOOK  
OF  
ROMAN LAW

BY  
MAX RADIN, LL. B., PH. D.  
PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA

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RAD.ROM.L.

## PREFACE

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THIS book is intended to be a brief and simple introduction to a large and difficult subject. I hope that it may be intelligible to those who have neither law nor Latin; but it is primarily designed for lawyers and law students who wish to become acquainted with the more elementary notions of the great system which has successfully disputed the domination of the modern world with the law of England.

Those who will wish to pursue the subject further must read harder and more comprehensive books, and if they mean to make very much headway they must acquire the language of the men who shaped the Roman Law and enlarged it to fulfill its superb destiny.

The notes in this book are principally references to the Latin sources. It will be found that only several instances are presented, of the many which might illustrate the points involved. Often the reason for selecting these instances, rather than others, has been the attempt to avoid those special situations of Roman social organization which have no real counterpart at the present day, the situations, that is, created by the domestic relations of *patria potestas*, of guardianship and slavery. Inevitably only a distorted picture can be gained, if we push into the background what was in the foreground of Roman consciousness; but there may perhaps be some advantage in moving for the most part among relations familiar to us.

Since I have had in mind readers who have some familiarity with Anglo-American law, I have illustrated Roman concepts by references to the common law more frequently than is generally done in such books, or than would be advisable if a general audience were chiefly in view. However, I have made an

effort to use only parallels which are self-explanatory, and not to insist upon them unduly.

Students of Roman Law rarely permit themselves to be far removed from M. Girard's *Manuel de Droit Romain* (7th Ed. Paris, 1924). It is a dependence one can scarcely wish to escape, since in fullness of content and lucidity of presentation the book belies its name and takes away the reproach of its class. More recently the "Text-Book of Roman Law" of Mr. W. W. Buckland (Cambridge, 1921) has furnished another brilliant example of the same qualities. In doubtful matters it is safe to rely on either of these guides, and it is rare indeed that guidance is not forthcoming.

It is hardly necessary to say that, in quoting the *Corpus Iuris*, I have used the modern method of citation, which discards Roman numerals altogether, and which gives the book, title, fragment, and section in that order. Unfortunately, the rather absurd practice of calling the first section *principium* (pr.) cannot be avoided. In German works, the literally preposterous habit of inverting half the citation still obtains to a very large extent, and since, during the nineteenth century, the German contribution to the study of Roman Law outranked in amount and importance that of any other single nation, this medieval tradition is a continuing nuisance. It may be hoped that it will soon be abandoned, and with it the equally annoying custom of impeding reference by the use of such terms as *h. t.*, *eod.*, and the like.

To Professor Buckland I owe an additional and personal debt for a number of valuable suggestions. I have also had the advantage of advice from my friends Dean Orrin K. McMurray and Professor Alexander M. Kidd of the School of Jurisprudence of the University of California. I am particularly indebted to Miss Elsie K. Jones, of the secretarial staff of the Law School, who prepared the manuscript for the press, and whose competence and industry made it possible to complete the book within the required time.

June, 1927.

MAX RADIN.

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C.—*Codex Iustinianus*.

C. I. L.—*Corpus Inscriptionum Latinarum*.

C. Th.—*Codex Theodosianus*.

D.—*Digesta*.

G.—Gaius (*Institutiones*).

I.—*Institutiones (Iustiniani)*.

N.—*Novellæ*.

Buckland, Text-Book—*Buckland, W. W., A Text-Book of Roman Law from Augustus to Justinian (Cambridge, 1921)*.

Girard, Manuel—*Girard, P. F., Manuel Élémentaire de Droit Romain (7th Ed. Paris, 1924)*.

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(xv)†





# HANDBOOK OF ROMAN LAW

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## INTRODUCTION

The Roman law is the body of rules that governed the social relations of many peoples in Europe, Asia, and Africa for some period between the earliest prehistoric times and 1453 A. D. This date should perhaps be extended to 1900 A. D., or even to the present time, and we might include America in the territory concerned. The people whose relations were so governed varied in number from the inhabitants of a miserable Italian village to those of an empire fully as great as any now existing. Yet the essential fact is that no present-day community—unless we except South Africa—consciously applies as binding upon its citizens the rules of Roman law in their unmodified form. That law is an historical fact. It would have only a tepid historical interest for practical men, if it were not for the circumstance that, before it became a purely historical fact, it was worked into the foundation and framework of what is called the civil law; that is, the law of all the non-English speaking civilized world, and among English-speaking nations, in whole or in part, the law of Quebec, Louisiana, Scotland, and South Africa—to name only the largest units. Further, on the common law it has exerted, both in its Roman and in its later form, an influence over which scholars may quarrel, but which is unmistakable and far-reaching. American judges have cited the Roman law in determining the questions

before them, and most English and American jurists treat it with an awe derived principally from lack of acquaintance.

American law has, however, a connection with the Roman law more intimate and direct than that derived from its English inheritance. At the time when the political severance took place, American lawyers and publicists were not disinclined to look for a broader basis for their institutions than the historical fact of their recent membership in a polity they had rejected. Both Kent and Story knew the Institutes of Justinian very well, and some at least of the later continental interpreters. They had no doubt that in public law the wickedly autocratic system was inferior to that which breathed the "free spirit of the English and American common law." 1 Kent's Commentaries (14th Ed.) p. 716. But, to quote the sentence immediately following, "Upon subjects relating to private rights and personal contracts" the Roman law seemed of outstanding excellence. Kent or Story is likely to be the shield behind which an American judge ventures to adopt a Roman law rule, and he generally does so with a sort of desperately timid reliance on their unchallengeable authority.

To Gibbon, and indeed to Kent, an eighteenth century commentator like Heineccius seemed to give an adequate account of the Roman law. As late as 1873, Mr. Justice Holmes (1 Kent's Commentaries [12th Ed.] p. 548, note 1) could add only a few modern writers, who "were said to be good," or were works "of reputation." We have advanced rapidly since then.

Modern students of Roman law have the advantage of the momentous critical and historical labors of the nineteenth century. The application of scientific methods to Roman law was in great measure the work of Carl Friedrich von Savigny (1779-1861). Since his time it has become a commonplace that law is determined by its historical background, that its general principles had an historic origin and manage to mean quite different things in the various stages of their appearance, that the books and documents in which we find the law set forth must be subjected to a close scrutiny, and that nothing is

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so fertile in legends as the received traditions which an organized profession transmits about itself and the development of its craft.

It was inevitable that rules developed in an economic structure of relative simplicity had to be emptied of their precise content when they were made to fit a more complex social organization. Of course, this is exactly what happened in England and America. It may be said with some truth that the changes were more deliberately and consciously made in the Roman law. Epochs, to be sure, are rarely recognized by those who live in them, and we cannot suppose that the various stages that Dean Pound has marked in the development of law were as apparent when they occurred as they are to us at the present time. But it does seem to be true that at the points which we now consider epoch-making there was less squeamish uncertainty in Roman law, less halting between two opinions, than at the crucial moments in the common law. It may well be that this contrast is due to the character of our sources; but, even when due allowance is made for that fact, there is sufficient left to support the suggestion made above.

We are dealing with the Roman system of law as an historical fact, and not as an existing and valid Code. For our purposes the Corpus Juris of Justinian, as set forth in § 34, represents it in its final stage, but it will be constantly necessary to show its doctrines and ideas in their process of growth. A brief account of the history of Roman law is an essential prerequisite to any understanding of it, and no history of Roman law is intelligible, except as a special aspect of the history of the Roman people.

## CHAPTER 1

## OUTLINE OF ROMAN HISTORY

## Section

1. First Period—From Earliest Times to 300 B. C.
2. Second Period—From 300 to 200 B. C.
3. Third Period—From 200 to 150 B. C.
4. Fourth Period—From 150 to 50 B. C.
5. Fifth Period—From 50 B. C. to 200 A. D.
6. Sixth Period—From 200 A. D. to 1453 (?) A. D.

FIRST PERIOD—FROM THE EARLIEST TIMES  
TO 300 B. C.

1. Rome was originally a small Latin community on the Tiber. It was ruled at one time by an Etruscan dynasty, which was expelled about 500 B. C. Within the next two centuries, by wars and alliances, it gradually became dominant in central Italy. This domination must not be confused with actual rule. The attempt of the powerful families or patricians to become an oligarchy fails.

It may be assumed that all educated persons have a general familiarity with Roman history. One cannot emphasize too strongly that a familiarity with this history is indispensable, and that no better introduction to a study of the Roman law can be had than a thorough grounding in the social and political history of Rome.<sup>1</sup>

<sup>1</sup> Books of reference for Roman history are numerous. The following list gives only a few of the smaller works which may be consulted by those who wish to get a general view of the subject:

Fowler, W. Wardé, *Rome* (Home University Library Series).

Pelham, F. H. *Outlines of Roman History* (The most recent revision of this admirable little book is in the author's article on Rome

The following meager outline is presented merely to have some of the necessary facts at our disposal for ready reference:

Rome was one of the chief communities of the Mediterranean world, and one of the principal exponents of the great Mediterranean civilization, of which our own is a modern development. We know very little of the origin of the tribes that first organized a community on some low hills along the Tiber, fifteen miles from the sea, the site of the later city of Rome. The only fairly certain facts of its legendary history are that it had at one time been ruled by kings, and that for a certain period the kings belonged to an Etruscan dynasty. At all times, however, the mass of the people were Latin in speech, and connected by constant personal intercourse and by religious bonds with a league of Latin-speaking communities, which had their federal seat near the Alban Lake.

The foreign dynasty was expelled about 500 B. C., and the royal office either abolished or allowed to lapse into practical desuetude. The control of the community during this so-called republican period soon came to be in the hands of a small number of powerful families, which at first attempted to constitute themselves as a sort of hereditary caste, the patricians. That attempt was unsuccessful, but Rome never became a real democracy, as Athens did. It was always possible for individuals of power and wealth to found new families, which, almost at once, or in a very short while, maintained themselves against the old ones; but, at any time in Roman history, actual control of affairs was almost certain to be in the hands of a small number of persons belonging to a limited number of clans or families.

Italy was the scene of constant wars between the many communities in the eleventh edition of the *Encyclopedia Britannica*, xxiii, pp. 615–658).

Giles, A. F. *A History of Rome* (People's Books).

Myres, J. L. *History of Rome*.

Among the standard treatises on Roman history may be mentioned those of Mommsen, Heitland, Merivale, Gibbon (Bury's edition), De Sanctis, and Eduard Meyer (in his *Geschichte des Altertums*).



munities and tribes which inhabited it. Beside the Latin tribes in the center there were the Umbrians across the Apennines, the Oscan-speaking Samnites to the south, and the Etruscans just north of the Tiber. In the extreme north there were the Gauls or Celts about the Po, and the southern and southeastern coast was controlled by great Greek cities. In the wars and alliances of these various tribes, Rome played a successful part. Although the city was sacked by the Gauls in 390 B. C., it recovered quickly, and by 300 B. C. it had become the most powerful community of central Italy, dominating Latins, Etruscans, Umbrians, and Samnites.

This predominance must not be confused with actual rule or annexation. The theoretical independence of all these communities was insisted upon. No regular tribute was paid to Rome. Her position was that of the acknowledged first city in her group, more than a match for any other, or any probable combination of the others, but in no sense bearing the relation of a metropolis to provincial towns.

## SECOND PERIOD—FROM 300 TO 200 B. C.

2. The struggle with the Greek cities of Italy and with the Phœnician city of Carthage in Africa fills this century. Rome becomes the chief power in the western Mediterranean. Appius Claudius (300 B. C.) emerges as the first great name of Roman history.

Rome's progress in civilization had hitherto been chiefly stimulated by contact with the Etruscans. Through the latter, as well as directly from Greek traders, the Romans had adopted a certain number of Greek practical arts, chiefly connected with navigation and agriculture. For the humane arts the Romans had so far shown less interest or capacity than most of their neighbors.

In the generation immediately before 300 B. C. the Macedonian Alexander had attempted to reorganize the eastern Medi-

terranean on the basis of a cosmopolitan Hellenism, in the form of a supermonarchy. His death prevented the success of the latter, but the other part of his work was brilliantly carried on in a group of monarchies which we call Hellenistic, and in which organization, both in politics and in civic culture, was brought to an extraordinary pitch. All the Greek communities of Italy, Sicily, and the western Mediterranean shared in the general and profound stimulus which the foundation of these great Greek states produced.

Rome found herself in direct conflict with the large Greek cities of southern Italy, of which Naples, Rhegium, Tarentum, and Elea were the most important. The nearest Hellenistic monarch was Pyrrhus of Epirus, a man of adventurous and romantic disposition, but in control of a country which was far from being as organized or as civilized as the great states further east. Pyrrhus made an attempt to assist the Greek cities in their wars with Rome and was finally forced to abandon them. With his withdrawal the pre-eminence of Rome in that section, as well as in the center of Italy, was readily acknowledged.

From this time on we can follow the history of Rome with considerable confidence. Greek writers who, just a generation before, had been able to state of Rome merely that it was an Italian city once taken by the Gauls, now have much to say of it; and, although it is a full century before there is any considerable Latin literature, the events and the persons in Roman history are fairly well established in our records. The first notable character of Roman history emerges, Appius Claudius, called the Blind, who effected notable reforms in the external appearance as well as the internal organization of the city. He seems to have checked a renewed attempt on the part of the ruling clans to constitute themselves a formal oligarchy. He provided for the city's future by a famous and still standing aqueduct, and a still more famous high road, the Appian Way.

The new career that Appius Claudius prepared his city for was one of active participation in Mediterranean affairs. The East was still, in population, wealth, and civilization, much the

more important part of the world, and remained so for more than a thousand years. Roman statesmen, between 300 and 200 B. C., however, looked to the West, where the Phœnician city of Carthage, in Africa, far outshadowed all other communities in power and resources. A war between Rome and Carthage for the control of Sicily occupied most of the century. In spite of the fact that most of the brilliant military successes were achieved by the Carthaginians, particularly under Hannibal, Carthage was permanently eclipsed after Hannibal's defeat at Zama in 201 B. C., and Rome found Spain, as well as North Africa, part of her "sphere of influence."

### THIRD PERIOD—FROM 200 TO 150 B. C.

3. Rome now becomes the most powerful state in the entire Mediterranean. An oligarchy of great families dominate it, the members of which gradually separate in culture from the mass of the people. There is a rapid growth in literature and all the finer arts.

The century-long struggle against a highly civilized power had developed a generation of men in Rome who could hold their own in the cosmopolitan politics of the eastern Mediterranean, where alliances and balances of power were struggled for on a scale as large as that of post-Renaissance Europe. In succession the great states of Macedonia and Syria were first humbled, then permitted to decay. The smaller kingdoms of Asia Minor were bribed or cowed into quiescent subordination. Egypt was kept in a sort of vassalage. Newer states were developed, to prevent the recrudescence of the great powers, and suppressed when they became troublesome. In 146 B. C. the punitive destruction of Corinth and Carthage was meant as a demonstration of Rome's undoubted hegemony in the Mediterranean.

In the two and a half centuries since Appius Claudius, Rome had acquired much more of the appearance of a great city.



It was still smaller and less splendid than famous cities like Alexandria, Antioch, Ephesus, Syracuse, Pergamum, Carthage, and Corinth, until the destruction of the last two; but, mean and squalid as it might seem by comparison, great physical changes had taken place.

Above all, great changes had taken place in the people. A partly cultured aristocracy actively patronized the fine arts and humanities. A real cleavage in interests, in speech and appearance, between this aristocracy and the masses, showed itself. Finally, what had been in a measure prevented before 300 B. C. was effected thereafter. A small number of families, each of which had only few members, were in factual supremacy. The vast resources which foreign victories and world pre-eminence placed at the disposal of the state were exploited for the individual enrichment of these men. More than by anything else, the contrast between the rulers and the ruled was intensified by the rapid increase of a landless proletariat. There was further a growing restiveness among Italians, as the privileged position of Romans turned into a legal superiority and was given arrogant expression in many ways.

#### FOURTH PERIOD—FROM 150 B. C. TO 50 B. C.

4. **The Century of Roman Revolution.**—This is the period of Rome's great men of action, powerful individuals who undertook to reorganize the state. In it lived the men who created Rome's greatest literary age.

The century between 150 and 50 B. C.—more precisely between 133 and 31 B. C.—is properly enough considered the century of the Roman revolution. The revolutionary movement was conducted by a series of great men, Tiberius Gracchus, his brother Gaius, Lucius Sulla, Gnæus Pompey, Gaius Julius Cæsar; not to mention the leaders in special and short-lived demonstrations, Saturninus, Lepidus, Catiline, Clodius. Of these, Gaius Gracchus, Sulla, and Cæsar had for a short-

er or longer time held in their hands the complete control of the state, with all its foreign ramifications. Only Cæsar had proposed to break completely with the old constitutional forms and to consolidate the Roman power as an undisguised monarchy. But nearly all, except perhaps Sulla, were clear-sighted enough to see that the control of the Mediterranean could not be maintained on the basis of permitting overawed provinces to pour their wealth into the hands of a small number of selfish oligarchs. Most of these revolutionary leaders had doubtless personal ambitions to serve. In part they were certainly impelled by the sense of individual power which had been so marked a characteristic of the Hellenistic age; but even the most radical and fanatic had some policy of general social or political reorganization in mind.

The revolution had involved almost continual warfare. Rome had gone through two civil wars between rival captains, and was to go through another. Another war in Italy had forced the formal admission of most Italians into the Roman civic community. Slave insurrections on a grand scale had occurred in Sicily and Italy. In Africa a new power had been crushed; in Spain a formidable revolt suppressed. In the East a desperate effort of Asia had required three armies and twenty years to put down. One of the periodic movements of the northern tribes had been beaten back by Marius about 100 B. C.; but the danger from that quarter seemed permanently removed by Cæsar's campaigns in Gaul, in Britain, and in Germany.

However, in Mesopotamia and the adjacent countries a great empire became established in the Parthian kingdom, which remained the chief enemy of Rome until the rise of Islam in the seventh century.

This revolutionary period is one of the picturesque epochs of Western history. It was the age of one of the most fascinating of ancient persons, Cicero, who was, besides, the greatest master of Latin prose. In it lived Catullus, the most genuinely lyrical, and Lucretius, the most profound, of Latin

poets. The great masters of the highly sophisticated and deeply influential Augustan age, Virgil, Horace, Livy, Ovid, spent their boyhood and their young manhood in its last decades. If it was a bloody time, it was also brilliant. The word "Rome" is more likely to evoke in the modern mind this stage of Roman development than any other.

#### FIFTH PERIOD—FROM 50 B. C. TO 200 A. D.

5. The first period of the Principate.—Augustus attempted to make the *princeps*, or emperor, merely a new magistrate, and otherwise to retain the old constitution. His scheme was gradually transformed into a highly organized monarchy. The reign of Hadrian (125 A. D.) is a turning point in this development.

The end of the revolutionary period was reached when Cæsar's grandnephew, known generally as Augustus, brought peace and temporary stability to an exhausted world. The constitution which he sponsored was an eclectic one. Many of the ideas of the better men of the oligarchy were retained. Roman citizenship remained a prerogative of a small number, chiefly Italians. The existing local communities were not merely to be perpetuated, but strengthened. Power, influence, and actual control of governmental functions were still practically hereditary, in a somewhat expanded group of families in which the old oligarchs were well represented. But a new super-magistracy was created. The title of *princeps*, which had by common consent been bestowed on many men, and particularly on Pompey, became the name of an office, with extensive and diverse, but after all limited, functions.

The long life of Augustus enabled this new constitution to be made effective, and, with various amendments, to be adapted to its vast object. Under Tiberius and Claudius the organization of the provinces was further carried on. A new type of career—trained officials—emerged. Functions became standardized. If a unity of Mediterranean society was still unthink-

able and undesirable, many minor differences tended to disappear, particularly the artificial ones created by a careful discrimination of privileges enjoyed. Imperial administrators showed a marked inclination toward uniformity.

The principate weathered its first great crisis in 68 A. D., when the Julian line died out in Nero, and the struggle between the military commanders placed Vespasian and his sons in power. The forms of Augustus' polity were still strictly respected; but the transformation of the principate into a centralized organism went on apace. Vespasian, Titus, and Domitian were of Spanish stock; their interests were Eastern, and they had little sympathy with the sentimental traditionalism to which Augustus so willingly deferred. The aristocracy—now greatly diluted—still possessed privileges, but they were rather honorary than substantial, and Domitian owes his bad reputation with posterity to an avowed hostility and contempt for the Senate.

In the following reigns a new social order was being created. Under Nerva, Trajan, Hadrian, Antoninus, and Marcus the highest point of Mediterranean civilization was in some respects attained; but, both politically and socially, profound changes had taken place. Hadrian particularly represents a turning point. A good deal of the Augustan constitution was so modified as to be unrecognizable.

#### SIXTH PERIOD—FROM 200 A. D. TO 1453 (?) A. D.

6. The Bureaucratic Monarchy.—In this period the Empire absorbed the whole Mediterranean into a common citizenship. Military needs became paramount. Two great reorganizations, one under Diocletian (290 A. D.), and another under Justinian (525 A. D.) gave a new impetus to the state, which survived until 1453 A. D.

The Cæsarean scheme was largely restored. The *princeps* was an undoubted king, whose primary interest was necessarily

in the East, where the center of gravity could not help being, if population, wealth, and culture could determine it. Rome and Italy were fast losing their exceptional position. While there were few large additions to Roman citizenship, the administrative differences in dealing with Romans and non-Romans became very few. A real cosmopolitan sense followed the enormously increased facility of communication, and the constant tendency toward economic interdependence of the various parts of the Meriterranean. The cosmopolitanizing influences were intensified by the spread of the denationalized Oriental religions, and of the most popular philosophy, that of the Stoics, which held, as its primary doctrine, the irrelevance of national distinctions. The limitations on the power of the *princeps*—still present in theory—no longer seemed to be essential. That they persisted was due to the fact that the *princeps* saw no reason to refuse to profit by the trained competence which an hereditary group of magnates provided.

With the advent of the Severan dynasty the last vestige of the scrupulous eclecticism of Augustus seems to vanish. The privileged position of Roman citizenship was abolished. All free residents of the Mediterranean world were, for fiscal and legal purposes, to be indistinguishable. A bureaucracy of petty officials, arranged in strict hierarchy, took the place of the old Roman council of oligarchs. Regimentation was attempted in the economic and social life as well. The reign of the Syrian, Alexander Severus (220–236 A. D.), put the finishing touches to the movement begun by Hadrian. What was left of the presidency of the Roman city was merely the language of the law courts and the titles of the magistrates.

By this time outside developments had made the indefensible character of the Roman frontier more evident. It extended over several thousand miles and possessed very few natural barriers. Against it there had been a constant pressure, which Cæsar's victories, and the more recent campaigns of Trajan, could not permanently relieve. After Alexander Severus, for some fifty years, a period of disorganization followed, marked by great



military disasters and transient successes. Individuals made futile attempts to set the cumbersome machine to work, and to meet the pressing military and social exigencies of the state with the resources of a demoralized system. In 290, Diocletian effected a new organization. Rome and Italy became for the first time merely geographical terms. The *princeps* was transformed into a semi-divine monarch, outside the body politic and above it. All the resources of the empire were concentrated upon the primary task of military defense. To that end the regimentation of Alexander Severus became intensified into something like a caste system, based on occupation and residence. Mobility of career was made possible principally in the army, and in the elaborate church organization of the Christian religion, which became dominant in the generation immediately following.

This new system—an undisguised absolutism—harked back to the ancient Egyptian model, but rather by way of the Hellenistic monarchies. It worked well, despite the extreme impoverishment of the empire and the growing economic wretchedness of the inhabitants. Of this latter fact a sinking population was the most ominous sign. Another was the surrender of the northern frontier to the Germanic and Tartar tribes. These were admitted into the Mediterranean lands, because they could not be kept out. By 500 A. D. Germanic kings ruled over motley populations in Italy, France, Spain, and Western Africa, although formally the authority of a Roman emperor in his remote and magnificent new city on the Bosphorus, Constantinople, was still acknowledged.

About 525 the emperor Justinian, through the efforts of a number of brilliant soldiers, brought Italy and Africa again under the direct government of officials sent out from the capital. It was, however, only a temporary flaring up of imperial power. The West lapsed into its former chaotic condition when the imperial armies were withdrawn, and a marked cultural decay set in, which we still call the Dark Ages. In the East a sadly shrunk state managed to keep alive an imposing organization

and to set in motion a new and impressive development of Greco-Roman civilization.

The spread of Mohammedanism reduced the effective control of the Roman state to a smaller and smaller part of the country back of Constantinople, but the empire held on for eight centuries, outlived the Arab caliphates, the newer dangers from Slav-ic and Tartar hordes, the Crusades, and the Western conquest, and did not finally crumble until the Turkish onset, beaten back so often, proved at last too strong for the enfeebled efforts of the last of the Cæsars.

## CHAPTER 2

## THE CONSTITUTIONAL AND LEGAL HISTORY OF ROME

## Section

7. The City State.
8. The Concept of *Ius*.
9. The Law of the Twelve Tables.
10. The *Legis Actio*.
11. The Five *Legis Actiones*.
12. An Actual *Legis Actio*.
13. The Procedure before the *Iudex*.
14. The Edict.
15. Appius Claudius.
16. The *Ius Civile* and *Honorarium*.
17. The *Ius Gentium*.
18. The Introduction of Equity into the *Ius Civile*.
19. The Beginnings of Jurisprudence.
20. The Formulary Procedure.
21. The Working of the *Formula*.
22. Development of the *Formula*.
23. Extraordinary Remedies.
24. Jurisprudence of the Revolution.
25. Legislation up to the End of the Republic.
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28. Equity and Natural Law.
29. The New *Ius Honorarium*.
30. The Effect of Imperial Expansion on Law and Procedure.
31. The Great Jurists—The Classical Period in Roman Law.
32. The Cognition Procedure.
33. The First Codifications.
34. The Codification of Justinian.
35. Interpolations.
36. Roman Law after Justinian.
37. An Example of Continuity.



## THE CITY STATE

7. The ancient city state was composed of—

- (a) The *populus*. Its power was called *maiestas* and its function was to make laws (*leges*) and appoint magistrates. Its meetings were called *comitia*, organized by *curiæ*, or centuries, or tribes.
- (b) The magistrate, *rex*, *consul*, *prætor*, accountable to the *populus*. His power, called *imperium*, was in theory unlimited and indivisible. The *imperium* enabled him to give obligatory orders to citizens.
- (c) The senate, the body of old men. It had *auctoritas*, in theory only advisory power, directed to magistrates or *populus*. Its resolution of advice was called *senatusconsultum*.

Roman law was developed in the frame of the city state. This form of political organization was common to most of the Greek states, both in Europe and Asia, and is found well developed in the extremely ancient communities of Mesopotamia. The sovereign was the *populus*, the entire body of adult males capable of bearing arms. This body possessed *maiestas*. It was organized in a complicated way, and had the two functions of making binding general regulations (*leges*) and of conferring upon individuals the power of issuing particular commands to other individuals. This power, *imperium*, whether it was held by a magistrate holding office for life, the king (*rex*), or by magistrates with very brief terms, such as consuls or prætors, was in theory unlimited and indivisible. A command given by a magistrate with *imperium* could not lawfully be disobeyed. The magistrate giving it might later be held accountable, or the order might be countermanded by another magistrate of equal or higher rank.

The implied assumption in the city state was that the *populus* was always so small in number that it could be gathered completely in a single place within hearing of one man's voice. At

Rome, when these meetings became regular, they were called *comitia*. Sometimes the citizens grouped themselves into groups called *curiæ*, semi-religious in character, in each of which members of the older families had a very real, if purely traditional, pre-eminence. It was then called *comitia curiata*. At other times, the grouping had a military purpose, which in ancient times was difficult to dissociate from a property qualification. Each man came with such military equipment of persons and material as his wealth enabled him to provide. This was the organization by centuries, *comitia centuriata* which in form remained the essential organization of the community when it attempted to exercise its political functions. And finally the citizens might group themselves by residence, *tribus*, tribes, which was felt to be the more democratic way and gave the assembly the name of *comitia tributa*. In the later republic, the centuries became divisions of the tribes, but the tribes themselves were not equal in number of members, and the unequal allotment of citizens to the tribes enabled the great families to exercise a control of Roman political affairs throughout the Republic.

Besides the *populus* and the magistrates, there was the senate, a body of old men, comprising the heads of families who had passed the age of military service. This body had *auctoritas*; that is, theoretically no power at all, but merely such weight as the distinction of its members gave it. We have seen (*supra*, § 3) that during a considerable part of Roman history this body became the governing corporation of the state, although in constitutional theory its functions never went beyond those of giving directions to the magistrates, which they were at liberty to disregard, or of preparing the drafts of laws which the legislating *populus* was at liberty to reject.<sup>1</sup>

<sup>1</sup> The standard manual of Roman Constitutional Law is the great work of Mommsen, *Das römische Staatsrecht* (3 vols. 3d Ed. 1887) translated into French by P. F. Girard (1895). Different views on many matters are advanced by Herzog, E., *Geschichte der röm. Staatsverfassung* (2 vols. 1884-1888), and Madvig, J. N. *Die Verfassung und Verwaltung des römischen Staates* (2 vols. 1882-1884), translated in-

Just as the technical name for a determination of the sovereign *populus* was *lex*, so the officially announced decision of the senate was given a special name, the *senatus consultum*. When, in later times, the magistrates also framed their determinations in an official dress, the term *edictum*, or *decretum*, was applied to this formal redaction.

### THE CONCEPT OF IUS

8. *Ius* was a course of conduct in which a citizen could command magisterial assistance. One of the early titles of the magistrate was *iudex*, the "ius-finder."

Before the city state assumed anything like a definite form, the Roman already had a concept to which he gave the name of *ius*; plural, *iura*. It was perhaps a manner of acting rather than a concrete thing, but he spoke of it very concretely. We may translate it by "right" or "rights," if we are careful to remember that it had originally no moral implications whatever. *Ius* was merely something which characterized a member of the community and him alone. It was a course of conduct which the community would take for granted and in that sense approve.<sup>2</sup>

The most striking form in which *ius* manifested itself was a demonstration against another person. Any one who laid hold of cattle, entered upon land, drove off or beat or forci-

to French by Morel (5 vols. 1882-1889). Mommsen published a summary of his *Staatsrecht* (Abriss, 1893), which contains some important revisions. There is no adequate treatment of the subject in English, although every history of Rome necessarily devotes a certain amount of attention to the constitutional organization. Mr. A. H. J. Greenidge's *Roman Public Life* (1901) is a good brief guide.

<sup>2</sup> The most complete discussion of the terms and concepts used by the Romans for "law" and "right" is to be found in L. Mitteis, *Römisches Privatrecht bis auf die Zeit Diokletians* (Leipzig, 1908), pp. 22-37.

bly seized some one else, might in so doing be exercising *ius*. The special instances in which such demonstrations of hostile power were *iura* were known in a general way, and can have been established only by custom.

All these things were done without the least relation to the state organization. They are all examples of self-help. *Ius*, indeed, may at this stage be defined as any instance of approved self-help.<sup>3</sup>

We find that one of the oldest titles of the holder of imperium was *iudex*, the *ius*-finder, or the pointer out of rights.<sup>4</sup> We may suppose, therefore, that his earliest function was to confirm a man, in doubt as to his right of self-help, in the conviction that he possessed such a right. But this function of pointing out *ius* was undifferentiated from the other functions of the magistrate, and it is highly likely that almost at once the *iudex*, who also had the power of issuing commands which could be drastically enforced, gave an applicant some assistance in obtaining the *ius* which was declared to be his.

The range of this assistance was at first narrowly limited. The magistrate could coerce. One of the symbols of his office was the ax and rods. He preserved order and prevented outrages between citizens in his presence. If, therefore, one citizen had, or claimed, a *ius* against another, and if he could get that other into the physical presence of the magistrate, he could both get his *ius* confirmed and get resistance to its exercise effectively prevented.

The simplest form of legal procedure, therefore, was the

<sup>3</sup> The history of Roman procedure has been most recently discussed by Leopold Wenger, *Institutionen des römischen Zivilprozessrechts* (München, 1925), largely on the basis of the researches of Moritz Wlassak. The enormous mass of new material furnished by the papyri has compelled a re-examination of most of the established theories on the subject. These theories are most fully set forth in Bethmann-Hollweg, *Der römische Civilprocess* (vols. I-III, 1864-1867); Girard, *P. F. L'Organisation judiciaire des Romains* (1901); Costa, *Emilio, Profilo storico del processo civile romano* (1918).

<sup>4</sup> Walde, *Lateinische Etymologie*, s. v. *iudex*.

act by which the possessor of a *ius* got his antagonist—generally by forcible means—before the magistrate, and the simplest decision was the latter's peremptory order to the plaintiff to abandon his attempt to carry out his pretended *ius*, or to the defendant to cease to resist it.

It is probable that the law-finding activity of the magistrate was at first a relatively simple task. The *ius* which was in doubt was very much like *ius* which was undoubted and the matter could be easily resolved. Soon, however, magisterial interference began to be freely invoked, because of the inevitable changes in the social and economic conditions of the people, and a burden was thereby imposed which the magistrate could not readily bear. To support a familiar exercise of *ius* was something he would unhesitatingly undertake. But a new form of *ius* was not so readily dealt with. We may guess that he denied his support, unless in some fashion the new *ius* was made to bear a close resemblance to one with which he was familiar.

We have only a vague idea of how this was actually done at Rome. At the earliest stage of Roman law of which we can find evidence, there is already a fully developed procedure, the *legis actio*, the "act of law," which perhaps might be more accurately called "the pursuit in accordance with a law." It will be dealt with in sections 10 and 11.

## THE LAW OF THE TWELVE TABLES

9. This ancient Code, passed in 450 B. C., was demanded by popular conservatism. Only fragments of it are known. The illustration given of Table I deals with procedure. It was regularly committed to memory, but the assistance of the *pontifices* was still necessary to go through the ritual of the *legis actio*.

The particular groups of acts which could be stated in the formal words of the *legis actio* were limited, but they were



not so precisely limited that every one knew, or by diligence could know, what they were. Liberally minded or astute *pontifices*, whose functions are described in section 10, might authorize the use of the *legis actio* in instances that were shocking because of their novelty. It is likely that the movement which resulted in the Decemviral Code, or the Law of the Twelve Tables, owed its incentive to the conservatism of men who resented the surreptitious introduction of new *iura*. That type of conservatism was especially strong in ancient societies and has always had popular approval.

The Law of the Twelve Tables was enacted about the year 450 B. C. The legends connected with its enactment have no claim to be regarded seriously. We must not forget that this period of Roman history must be reconstructed out of the scantiest materials. Nevertheless the mere fact that such a code was established is itself evidence that the community was growing in power and self-consciousness.

Only fragments of the XII Tables have been preserved in anything like their original form.<sup>5</sup> Of many of its provisions we know the substance only. While the statements of later writers about the various provisions must be received with caution, there are many references which we can safely accept as authentic. Ingenious scholars have pieced together and arranged, as far as possible, the citations of the Tables and the references to them by later Roman writers. They may be found in Latin in the collection of sources made by Bruns, by Girard, and by Riccobono. A different arrangement, with English notes, was made by Wordsworth in his *Fragments of*

<sup>5</sup> As stated in the text, accessible English translations of the extant fragments of the Twelve Tables are to be found in Hunter, W. A., *Roman Law* (4th Ed.); Wigmore & Kocourek, *Sources of Ancient and Primitive Law*.

The only English commentary on the Latin text is in Wordsworth's *Fragments of Early Latin*. The texts are collected, with full citations of the sources, in Girard, P. F., *Textes de Droit Romain* (5th Ed. 1923); Riccobono, S., *Fontes Iuris Romani* (1909); and Bruns-Grademvitz, *Fontes Iuris Romani* (7th Ed. 1909).

Early Latin. A translation of those parts which seem to be citations is to be found in Wigmore and Kocourek's *Sources of Ancient and Primitive Law* and in Hunter's *Roman Law*.

Inevitably there must be much that is conjectural in such reconstructions, but the probability is very high that, in contents and arrangement, the Twelve Tables were very nearly as they are represented in these collections.

The following rendering of the fragments of the first table are meant to suggest the rudeness and concision of the archaic style and something of the nature of the contents of this ancient code:

#### TABLE I

1. If one is called into law, he shall go. If he does not go, let a witness be taken; then let him be arrested. If he objects or struggles, let hands be laid upon him. If age or illness make him weak, let a beast be given him. If (the plaintiff) does not wish, he shall not prepare a wagon.

For a land-holder, let a land-holder be warrantor. For a landless citizen, let who will be warrantor.

Where they agree let him plead. If they do not agree, let them join issue in the *forum* or in the *comitium* before noon. Then let both in each other's presence, make all their pleas. After noon, decision shall be rendered to the one who is present. If both are present, sunset is the latest time.

The entire Twelve Tablets could easily be committed to memory. Indeed, we know that it soon became the practice of all Romans who were educated at all to learn the Code by heart, a practice that continued till Cicero's boyhood. The persons who knew the Twelve Tables would therefore know the situations in which the magistrate would be fairly certain to permit him to go through the ritual of a *legis actio*, provided he could remember the right words or had some one at his elbow who could jog his memory. No *iudex* would be necessary, if there was no issue as to the facts. In that case the procedure was

merely the magisterial authorization for the exercise of self-help. It may be conjectured that two *legis actiones*, that of Distress and that of Body Execution (*per pignoris capionem* and *per manus iniunctionem*) were such authorized forms of self-help.

### THE *LEGIS ACTIO*

10. The means of obtaining *ius* was the *legis actio*. This was a ritual procedure, and therefore under control of the *pontifices*, who were priests, and often magistrates as well, but did not form a special caste.

The effect of the *legis actio* was to compel the magistrate to act.

The word *lex*, from which our word "law" is derived, is an entirely different term from the word *ius*. It belongs to the state organization, and it means, as we have seen (*supra*, § 7), an act of the *populus*, in form directed to all the citizens, but in fact, and often in form, giving general directions to the magistrate. We may assume that at some time a *lex* had required or permitted the magistrate to enforce a *ius*, which was demanded in a particular way by a particular procedure, and this procedure was in consequence called a *legis actio*.

This *legis actio* had probably grown up independently, and had been in frequent use before it was formally adopted. It was essentially a ritual, and because of that fact it was something which had been elaborated by the priesthood, especially the group of *pontifices*.

On the function of the *pontifices* we must dwell a little. They were in no sense a caste, nor did they form a clerical body, living a life apart from the mass of the community. Again, they were not dedicated to the service of any one deity, and therefore the ministrants of any particular form of divine services. They were the mediators, in general, between the gods and men. They knew how to reach the divine inhabitants of the community.



This power of access, and this capacity to know the divine will, they derived from a tradition. It had been handed down by the older *pontifices* to the younger men whom they elected into their body. The number of *pontifices* became fixed, and membership in the *collegium* became a highly prized privilege of the older families, the patricians, those who in the first centuries of the Republic had sought to turn their dominant position into a formally recognized caste.

Moreover, the *pontifices* were not, as such, magistrates, but merely the guardians of an ancient and essential wisdom. They were the custodians of sacred places, of holy things, and of all liturgies, and it is likely that they kept records and memoranda before any one else in the community attempted to do so.

The use of a formula, some compelling form of words, in calling upon a magistrate to exercise his power in one's behalf, is very ancient and widespread. It was likely to be particularly the case among the Romans, who retained more fully than other Mediterranean people a sense of the efficacy of charms and ceremonials in most of their communal activities. The knowledge of the formula which the magistrate would be likely to admit as efficacious was in the possession of the *pontifices*, as all other formulas were to be found there. Doubtless it had long been a practice to apply to the *pontifices* for some formula like this before the law which gave the *legis actio* its name had made such a formula necessary.

There would be no conflict between magistrate and *pontifex*, since the magistrate was often a member of the sacred college himself, or closely associated with those who were. He would be scrupulous in insisting that the ritual should be properly obtained and precisely followed. Since it was a ritual, an error, even a trivial one, was necessarily fatal, and the magistrate would be as anxious a precisian in this matter as any other Roman. But there seems to have been from the beginning a tendency to permit a slightly greater freedom here than was allowed in the unmistakably religious ceremonies. Stuttering was fatal

in the case of the latter, but not in the legal formulas—at any rate, not when the *legis actio* had become a definite form of procedure.

### THE FIVE *LEGIS ACTIONES*

11. The five *legis actiones* were: *L. a sacramento*, the most general one; *l. a. per manus iniunctionem*, attachment of the defendant's body; *l. a. per pignoris capionem*, attachment of the defendant's property; *l. a. per iudicis arbitrive postulacionem*, demand for a special arbiter; *l. a. per condictionem*, demand for a special framing of the issue.

There were five forms of the *legis actio*, of which only one, *legis actio sacramento*, is described in some detail in the sources.<sup>6</sup> An illustration of one of its applications is given in the following sections. The term *sacramentum* was applied to the stake which both parties deposited. When the matter in dispute exceeded 1,000 *asses*, the *sacramentum* was 500 *asses*; otherwise, it was 50. This was a large sum of money at the time of the XII Tables, and effectively limited rash or unwarranted litigation.

The *sacramentum* was returned to the successful party and forfeited by the loser.

The next two *legis actiones*, *per manus iniunctionem* and *per pignoris capionem*, may approximately be rendered by "arrest" and "attachment." Their exact nature is much disputed. The most plausible suggestion is that which makes them resemble the processes of arrest and attachment at the common law. In that case they would rather be stages in a legal procedure than complete forms of suit by themselves. In their names they seem to

<sup>6</sup> G. 4, 10–29, especially section 16. The literature on the subject is very great. Cf. Muirhead, *Historical Introduction*, § 13 et seq., and the works on Roman procedure already mentioned (section 8, note 2). A derisive account of the *legis actio* is furnished in Cicero's oration, *Pro Murena*, § 12 et seq.

indicate, what all procedure may well have been originally, viz. legalized forms of self-help. In that case they would represent a still earlier form of the *legis actio* than the *legis actio sacramento* itself.

This type of procedure, and these particular *legis actiones* were not created by the XII Tables, but were apparently in existence before that Code. It is, however, likely enough that they were modified somewhat in form and effect by the XII Tables. But two other *legis actiones*, the *l. a. per iudicis arbitrive postulationem* and *per conductionem*, are almost surely later.

Of the first we know only the formula or application, and of the second very little more. They seem to have been steps in the attempt at adaptation of the *legis actio* to the new conditions—an attempt which finally resulted in the complete abolition of this procedure. The *l. a. per iudicis arbitrive postulationem* may, we can suppose, have been without the formalism of the older procedure. Perhaps it lay only for situations obviously younger than those in which the *l. a. sacramento* had become traditional.

The *l. a. per conductionem* is as uncertain in its application. “*Condictio*,” in later law, was the suit for a liquidated amount or for a definite quantum of property. That cannot very well have distinguished it from the *l. a. sacramento*. Since it is the latest form, and cannot have been much earlier than the rise of the formula (infra, § 20), we may guess that it anticipated the formula somewhat, and that the issue was framed upon application to the prætor by a certain give and take of demand and cross-demand, resulting in specific instruction to the *iudex*.

The characteristic element in the *legis actio* was the shifting of the name and the function of the *iudex* from the magistrate to some citizen appointed by him. The finding of *iura*, new *iura*, could scarcely be imposed upon the chief of a community engaged not merely in constant wars, but in still more frequent negotiations with foreign states. A Roman public man was first of all a diplomat and soldier, not a lawyer. To discover whether the *ius* claimed did or did not exist, assuming a proper *legis actio*

to have been commenced, was something the magistrate was glad to assign to a *iudex*. He, for his part, announced in advance the support of his *imperium* to whatever should be determined by the *iudex*.

It can hardly be doubted that the magistrate might, if he chose, refuse to constitute a *iudicium*—that is, refuse to appoint a *iudex* to determine the controversy—even when the *legis actio* was properly announced and obviously applicable. When there were several *legis actiones* available, he certainly could determine which he would allow. The most obvious check upon arbitrariness was the consciousness of his short tenure of power and the powerful pressure of his associates in the governing class. Perhaps another effective check was the natural conservatism of an average official, who would scarcely feel himself free to refuse what he knew to be generally allowed.

### AN ACTUAL *LEGIS ACTIO*

12. A *legis actio* could be brought only on certain days, called *dies fasti*. It consisted of a debate in the prætor's presence (*in iure*), and its essence lay in claim and counterclaim to the same *res*. In the case of the *l. a. sacramento*, the *sacramentum* was a stake forfeited to the state by the losing party.

We have in the Institutes of Gaius (*infra*, § 31) a description of a *legis actio sacramento* in the suit by A against B for a slave—in effect an action of detinue, but one in which title, and not merely possession, was tried.<sup>7</sup>

A had in public made a demand upon B for the slave; on its refusal, he had summoned him at once to the prætor—provided, as we have seen, that it was yet forenoon. Another requisite was that the prætor was holding court that day. The list of days on which the prætor was sure to be found in the forum or *comitium* was in later times posted on the official calendar in the

<sup>7</sup> G. 4, 16.

forum itself. They were called the *dies fasti*, because on them only the prætor could utter (*fari*) the words that created a judgment—(*do, dico, addico*, “I grant, I declare, I convey”). But, at the time of the Twelve Tables, the list of the *dies fasti* was still a secret of the *pontifices*. It may be they were not yet absolutely fixed days, and that the pontiffs, by special rites—which, of course, they only knew how to perform—had to determine whether the day was *fastus* or not.

But, assuming that the prætor was there, the defendant was perforce—since he had been properly summoned—compelled to follow the plaintiff *in ius*; that is, into the presence of the prætor. Then the ritual would proceed as follows:

*Plaintiff*: (Takes a wand, places his hand upon the slave, and touches him with the wand.)

I assert that this man is mine, in the exercise of my right as a Roman, to whatever extent he can be the property of any man. Thus have I spoken; look you, and I have placed my wand upon him.

*Defendant*: (Repeats the words and performs the exact gestures of the plaintiff.)

*Prætor*: Release the man, both of you.

(At this both withdraw their hands and wands.)

*Plaintiff*: I demand that you tell on what ground you have claimed this man.

*Defendant*: I exercised my right and thus placed my wand upon him.

*Plaintiff*: Since you have made the claim unjustly, I challenge you with a stake of 50 *asses*.

*Defendant*: And I you.

From the above dialogue we can form a clear idea of how, in this ritualistic stage, procedure was carried on. An issue was not created by assertion and denial, but by the fact that two parties asserted contradictory rights. The only unmistakable contradiction is that in which identical words are uttered by two opposing litigants.



Secondly, we see how the magistrate intervenes. Strictly speaking, he immediately takes the disputed property himself. It is now in the custody and control of a man clothed with *imperium*. He may assign it to either party, and only by such assignment—*addictio*—will it pass out of his hands into possession of either claimant.

The money deposited was a literal stake. Whoever had made the claim unjustly agreed to forfeit the amount. It became *sacrum*, dedicated originally to some named or unnamed gods, although afterwards such dedication merely made it state property.

### THE PROCEDURE BEFORE THE *IUDEX*

13. The *iudex*, who was a private citizen, generally a senator, determined facts and law in accordance with the prætor's instruction, and made a final and unappealable determination of the issues.

The general formality of the *legis actio* is indicated by the invariability of the wording, so that "vines" could not be used if the form required the word "trees."

The duty of determining who had made the claim in accordance with *ius*, and who had not, rested with the *iudex*.<sup>8</sup> In later times, he was selected by a process of nomination by the plaintiff and rejection by the defendant until agreement was reached. The *iudices* were at this ancient period certainly senators, so that the panel of *iudices* was identical with the senate. The *iudex* agreed upon was then invested with his functions, and the prætor conveyed the disputed slave in advance to whomsoever the *iudex*

<sup>8</sup>This part of the procedure has generally been called *in iudicio*, to distinguish it from the part which was carried on before the magistrate, *in iure*. Recent researches indicate that a more correct designation of the second part of the procedure is *apud iudicem*. Wenger, *L., Institutionen des röm. Zivilprozessrechts* (1925) p. 181, note 1.

would declare entitled, or perhaps empowered the *iudex* to make the conveyance.

What the *iudex* actually did we can only guess. The ritual is over when the controversy reaches him. He might listen to the pleas of the litigants, hear their witnesses, himself investigate the matter, and decide it finally. In the case we have described it may well be that what we should call a matter of law, rather than of fact, was before him. He might or might not consult some experienced persons and follow their advice. But of one thing we may be sure: He was almost never whimsical, and he determined the ownership of the slave as most men of his rank and kind would have determined it.

In all this there is obviously no room for appeal. Not to the magistrate, for he has already decided that whoever should be declared in the right should have the slave, and it is likely that he could not decide otherwise without violating the law. And certainly there was no possibility of going beyond the magistrate, since, except as an act of *imperium*, it was impossible to get the property out of the hands of both claimants and into the hands of the one finally successful.

This fact must be kept in mind in the entire history of Roman law: That a Roman trial was under the immediate supervision of a magistrate, possessing a theoretically unlimited power, who might freely manipulate the details, and whose determination, either by himself or his appointee, the *iudex*, was not appealable.

There is a famous instance which illustrates the character of the *legis actio*: The XII Tables gave damages for the destruction of trees. A grape grower, whose vines had been cut down, sued by *legis actio* in the words of the statute, except that he substituted the word *vites* (vines) for the word *arbores*. He lost his case, doubtless because the magistrate refused to constitute a *iudicium* on this question. Yet it is plainly indicated in the account which we have that, if the plaintiff had used the word *trees*, the trial would have gone on, and he would have been allowed to establish his claim. This was done by a simple act of

interpreting *arbores* as a generic word, which would include grapevines as well.

## THE EDICT

14. Fiction, legislation, and equity were not successive in Roman law, but generally simultaneous. The *edict* was the magistrate's announcement of the *iura* he would enforce, in addition to those established by statute.

Edicts became particularly important when a new magistrate, the *prætor*, was created in 367 B. C.

We are familiar with Sir Henry Maine's assertion that legal progress was obtained first by fictions, then by equity, and finally and lastly by remedial legislation.<sup>9</sup> This simple scheme is not borne out by Roman legal history. Not only are the XII Tables themselves an example of legislation, both declaratory of established *iura* and constitutive of new ones, but statutes were passed with relative freedom thereafter, modifying, repeating, and adding to the list of *iura* originally set forth.

Further, "equity" shows itself very soon. One of the commonest illustrations of equity is the power of a magistrate to adapt old forms to new conditions by interpretation. This has already been exemplified in the very early conflict caused by the introduction of viticulture into Italy. And equity was even more fully represented in the edicts which the Roman magistrate issued. This was an ancient power, which directly flowed from his *imperium*.

Edicts may have originally been a warning against certain frequent types of breaches of the peace, which the magistrate intended to suppress with especial rigor. But a number of developments soon changed the edict's character. We must remember that self-help was in the minds of most men still the fundamental way of securing one's *ius*. The XII Tables and their

<sup>9</sup> Maine, H. Sumner, *Ancient Law*. c. I, p. 29 (Pollock's Ed.).



amendments merely indicated cases in which the self-help would be supported by the magisterial *imperium*. But that this list was exhaustive was not a necessary inference, and the popular feeling drew no such inference. In the relations between man and man conflicts were inevitable, and *iura*, methods of acting claimed to be proper, were involved which were obviously not in the list. These almost any one would attempt to settle by self-help, with all its concomitants of riots and assaults. In his edict the magistrate set forth certain common cases in which disturbances were apprehended, and announced his intention of helping a person wronged by these disturbances to adequate redress.

The importance of the edict—perhaps its origin—may be dated from the creation of a new magistrate in 367 B. C., nearly a hundred years after the XII Tables. This new magistrate retained the old general title of an imperium-holding officer—that of prætor, and he became a junior colleague of the two already existing magistrates, the consuls, as they thereafter came to be known. Rome (cf. *supra*, §§ 1, 2) was rapidly recovering from the disaster of the Gallic invasion, and the principal men of the state were chiefly engaged in leading armies which re-established Roman hegemony in central Italy. This intensified in the growing community the need of an imperium-holding magistrate—to give effect to the *iura* which were constantly being created and modified.

## APPIUS CLAUDIUS

15. Appius Claudius and his clerk, Gnæus Flavius, made legal knowledge available to every one. The first plebeian chief *pontifex*, Tiberius Coruncanius, offered legal advice to all who consulted him.

The next important stage of Roman history of law is that inaugurated by the administration of Appius Claudius (*supra*, § 2). Rome was consolidating her Italian pre-eminence, and the far-seeing statesmanship of this extraordinary man was directed, not only to the obvious foreign conflicts impending, but

to the weakening of the powerful clans, whose members, in spite of their diminishing number, were still most frequently selected for the magistracy, and were the exclusive holders of all pontifical functions. It seems that they were once more utilizing their actual power in a conscious effort to perpetuate their domination.

Appius' clerk, the *quæstor* Gnæus Flavius, a man himself of servile origin, published the exact wording of all the *legis actiones* as well as a list of the days which were *fasti*. (Supra, § 12.) Many of these facts must have been known to any alert citizen, but they were now official and the prætor, without incurring intolerable odium, would not dare to refuse what all the people would know to be *ius*. The collapse of the last stronghold of the patrician clans, the pontifical college, may be dated from this publication by Flavius. The *pontifices* still were consulted because their practice had supplemented and modified the *legis actiones*, but any attempt to utilize the knowledge of that practice for partisan ends was rendered impossible since—doubtless through the influence of Appius,—in 300 B. C. plebeians were co-opted into the college. One of the first of the plebeian pontiffs, P. Sempronius Sophus, may well be called the first lawyer. At any rate, in 253 B. C., Tiberius Coruncanius, the first plebeian to be elected *pontifex maximus*—i. e. head of the college and religious head of the Roman community—was very decidedly a lawyer, and emphasized that fact by offering free public instruction in the use of the *legis actiones* to all who chose to consult him on the subject.

### THE *IUS CIVILE* AND *HONORARIUM*

16. The increase in foreign relations required a new magistrate, the *prætor peregrinus*, 243 B. C.

The *iura* he administered needed a new basis.

*Ius* was now used as a totality of *iura*. The first division was between:

- (a) *Ius civile*; the law based on the XII Tables and the later statutes.

- (b) *Ius honorarium*; the law as derived from the practice in the prætor's court, and ultimately embodied in the edict.

By this time Rome had already become a formidable world power. She was engaged in the first of her violent struggles with Carthage (supra, § 2), and just at that time had suffered several serious defeats by land and sea. But within the following ten years she had regained her military ascendancy and had made good her control of the great prize of Sicily. The new turn in her fortunes was marked by creating a new magistrate, a new prætorship, to deal with the increasing difficulties of litigation between Romans and foreigners, the *prætor peregrinus* (243 B. C.)

This new prætorship compelled a discrimination in law, which was destined to be of great importance. The *iura* enforced before the old prætorian tribunal had to be differentiated. They were called "civil," dealing with the rights of citizens (*civis*) among themselves, as distinguished from "foreign," *gentium*, referring to the various nations of every kind who might have, by treaty or personal privilege, a right to call upon the intervention of a Roman magistrate.

Perhaps the habit of using *ius* as a collective name for the totality of *iura* arose at this time. It was an unfortunate habit, and bequeathed to the later law and the modern European law a distressing and confusing terminology. *Ius* became a system which tested the validity or existence of "rights" (*iura*), as well as a name for the individual right itself. The same confusion exists in all the continental countries, where the modern equivalent of *ius* (*Recht, diritto, droit, derecho*) has been divided into "subjective" and "objective law," and a literally interminable controversy has been occasioned concerning the validity of the distinction.<sup>10</sup> We may be sure the Roman intended no such

<sup>10</sup> We may cite a single representative of the whole controversy, the discussion of the matter by M. Duguit, *Law and the State*, 31 *Harvard Law Review*, 1-185, especially page 65 et seq.

portentous result, but simply meant to make clear that *ius*, in its broadest sense, was a means of helping him to his *iura*.

Yet he certainly already apprehended—even if he did not express—an important distinction. There was the *ius* which he might get from the prætor by means of a *legis actio* in accordance with the express terms of the XII Tables and the laws that amended it. This he was later to call the “civil law”—the *ius civile*. Then there was the possibility of calling in the prætor for aid in an emergency in accordance with the terms of the edict. And, equally by the edict, there were important limitations and extensions which the prætor declared he would observe in granting *legis actiones*. The *ius* that was obtained from this practice in the prætor’s court was “official” law, *ius honorarium*.

This *ius honorarium*, we must remember, was anything rather than a system, and was not even as indifferently well classified as the XII Tables. Indeed, one could not be sure whether this year’s *ius honorarium* would be like last year’s, until the edict was published, and one could not even then be quite sure, for any prætor might—and conscienceless prætors did—disregard their own edicts.<sup>11</sup> But that was rare. In general, one edict came to be very much like its predecessor, differing rather by small additions than by omissions of what had already been accepted.

However, in 243 B. C., the *ius honorarium* was still of slight extent and importance, and its real career had only fairly begun.

<sup>11</sup> Cicero made it a special count in his indictment of Verres that he had decided contrary to his own edict (*in Verrem*, II, i, 46, 119)—“*sine ulla religione*, unscrupulously”—although the prætor was under no legal obligation to follow it till a Cornelian law of 67 B. C., twenty years after the prætorship of Verres.

### THE IUS GENTIUM

17. The basis of law in the peregrine prætor's court was the *ius gentium*. This was not comparative law, but a system based on general equity, *æquum et bonum*, confirmed by general and widespread usage among many communities (*gentes*).

This court had special *iudices*, the *recuperatores*, "board of recovery."

To a much slighter extent, *bonum et æquum* was applied very early in the urban prætor's court as well.

The presence of a large number of foreigners in Rome was a direct consequence of the importance of the city after the war with Pyrrhus (*supra*, § 2). Rome was the dominant state in Italy and one of the two great powers of the western Mediterranean. Its Italian power had been gained by diplomacy as much as by war, and there were groups of cities which had treaties with the mistress city. By most of the treaties the citizens had mutually the right of transacting business with each other, and, whether as a necessary consequence or not from this fact, the *ius commercii*, most of them might ask state assistance in recovering property which a Roman wrongfully took from them. This typical and common instance of a grievance between citizens of different communities gave the name to the body whose duty it was to determine whether any such claim was just—the board of recovery, *recuperatores*. Doubtless they existed before 243 B. C., but after that time they were in frequent session since the new prætor (peregrine prætor) had constant need of their assistance.

Anything like a *legis actio* was not to be thought of here, if for no other reason than that the *legis actio* probably always contained the phrase *ex iure Quiritium*—"in the exercise of my rights as a Roman," and at this time, certainly, procedural words were unalterable. But there was also the additional reason that no type of procedure would seem proper in the case of so many



different kinds of plaintiffs. To be sure, many of them were Latins, whose forms and notions would be very like those of their Roman kinsmen ; but there were also Etruscans, and above all the ubiquitous and strangely foreign Greeks.

What the peregrine prætor did was apparently to listen to the plea, and formulate, or let the parties formulate, what seemed to be the basis of the controversy. This was put into the form of written instructions to the *recuperatores*. He was much more of a master than his colleague at the other end of the forum, for he was limited by no law directing his operations, and foreigners had only slight means of protecting themselves against even grossly illegal exercise of *imperium*. The written instruction was called a *formula*, and this technical use of the word must not be confused with the ordinary English word "formula."

Where did the peregrine prætor get the ideas which governed the substance of the written instructions he gave the *recuperatores*? He was, like all the other magistrates, a Roman magnate, often a rude soldier, always, first and above all, an administrator, who, particularly at the time the office was instituted, had duties that far transcended in importance his legal activities. To think of him as making a careful study of the foreign laws by virtue of which each successive plaintiff, Ligurian, Neapolitan, Capuan, claimed to get the thing he demanded, involves an absurdity. Doubtless customs that were plainly common to many nations had a great deal of weight in determining whether a demand was *ex iure* or not. A Roman magistrate could easily be made to understand that titles to land and property were among other nations generally passed by delivery and payment, and not by the formal livery of seisin to which he was accustomed in Rome. But principally he had to keep in mind that it was a Roman citizen whose *ius* was challenged by a foreigner, and his instruction must accommodate itself to the general sense of reasonability and propriety that Roman citizens would wish to be applied in governing their dealings with foreigners.

The *ius gentium*, then, this totality of the *iura* which the peregrine prætor would lend his *imperium* to enforce against Roman

citizens on behalf of foreigners, was apt to be a complex of observed and quite obviously general customs and of rules derived from a sense of propriety; rules that embodied the general civic morality, the *bonum et æquum*—"that which was good and fair."

The *bonum et æquum*—the standard of civic morality—was not altogether absent in the older prætorian court, often called that of the city prætor (*prætor urbanus*). It was open to the prætor to deny a *legis actio*, even if all forms were observed, and, in what seemed flagrant cases, he would do so. And he would be assured of the popular support in his refusal, if the case was really flagrant. Many prætors may have refused to entertain an *actio* by an emancipated son against his father, by a freedman against his former master, long before such refusal was announced in the edict as a permanent policy of the court. This, we must recall, was the case, no matter how well-founded the claim was. But it was also a matter which would have shocked ordinary men to hold that a claim could not be asserted merely because it bore hard upon one party, or even because it was oppressive and ill come by, just as we are shocked by decrees of confiscation, even if the persons whose property is confiscated are wicked and unpopular. We can scarcely doubt men were fully aware that in the urban prætor's court an unconscionable claim might sometimes be *ius*, but they would hardly tolerate such a claim in the court of the peregrine prætor. There is an inevitable gap in every system and at every time between what a court will help one to get and what a thoroughly conscientious man will voluntarily forego. This gap was larger in the older court than in the newer.

Our historical records—poor as they are in detail—leave no doubt that law as practiced in the urban prætor's court was hard on poor men; that the rich and powerful exacted the utmost of their legal due, and that even gross violations of law took place for which redress was difficult, when the magistrates were closely associated in hundreds of ways with the oppressors. But it must also be admitted that various types of economic pressure were slowly being corrected by legislation, and that a gradual



tendency toward humanity is early discernible in the intervention of most magistrates.

## THE INTRODUCTION OF EQUITY INTO THE *IUS CIVILE*

18. The following century saw changes in the *ius civile*. New *legis actiones* were created. Finally by the *lex Æbutia* (150 B. C.) the "formula," procedure of the peregrine court, was permitted in the other prætor's court.

The *bonum et æquum* and its warrant, the *ius gentium*, became a part of the law administered in both courts.

The prætor's equity, as embodied in the edict, must not be taken to be a bold revision of *iura* in an attempt to do equal justice between the parties. But when it was the peregrine prætor who was appealed to, when the primary basis for redress was the magistrate's sense of what was right, an oppressive demand could not very well constitute a *ius*.

In the century that followed the creation of the peregrine prætor's court—the century that witnessed Rome's rapid rise to the commanding position of the Mediterranean—there is a definite growth of all the elements of the Roman system.

First of all the *legis actio* suffered great modifications. That foreigners—who were still chiefly Italians, and not really strangers—were allowed to use the *legis actio* in certain cases is of no great significance, except that it indicates a certain flexibility. New *legis actiones* were introduced—perhaps the *legis actio per condictionem*, of which we know little, except that it was not so old as the others, must be placed at this time. It seems to have had a very general application. Its name lends color to the supposition that it obviated the difficulties

of the *l. a. sacramento*. It had no expensive stake, and perhaps a less rigid ritual of words and expression.

But, although the *legis actio* might have developed further in this direction, it was doomed to extinction. Litigation in the peregrine court was growing apace. The repetition of actions made certain *formulae* as well known and as readily discriminated as the kinds of *legis actiones*. If there had been any trace left of the prevalence of barter, it disappeared as the city became less a group of peasant proprietors and more a community of large landholders and cultivators and merchants. These latter—particularly the bankers, whose services they needed so much—were likely to be Greek or of Greek origin. With this economic change the requisites of greater variety of legal forms and expedition of legal procedure would make itself felt. Perhaps Roman citizenship was already largely diluted with freedmen of Eastern nationality, who must have found the Roman *legis actio*—which it was now their privilege to use—a dubious advantage.

Finally the momentous step was taken of permitting the use of the *formula* in a *iudicium* organized by the urban prætor. This was done by a law—the *lex Æbutia*—which may be placed at about 150 B. C. Its passage was not only a great convenience to litigants, but it opened a way for magisterial interference in a fashion that had not existed before.

Formerly, in the urban prætor's court, the *æquum et bonum*, the magisterial equity, could show itself in most instances only in the form of the prætor's refusing a *legis actio* which he could not approve. Plainly this was somewhat drastic, since many claims cannot be characterized as wholly bad or wholly good. But even this limited application of equity permitted important contributions. It allowed, for example, the introduction of what came to be called prætorian titles, and it made possible the development of the idea of possession as a form of title. The most important types of Roman property, land, slaves, cattle, could be transferred only by an elaborate ceremony—*mancipation*—even more complicated than the English livery of

seisin (*infra*, § 131). Property informally transferred could not strictly be owned; but, if it had been delivered and paid for, the prætor treated the possession as title. He allowed no recovery by the former owner, and he gave every remedy to the possessor which the owner could have.

In this way, almost inadvertently, the prætor created, not merely supplementary, but superseding, *iura*, and the *ius honorarium* began to rival the *ius civile* in bulk and importance. As for the *ius gentium*, this was, we must remember, less a technical name for a body of *iura* than a means of justifying the introduction of new ones. Such and such an institution was equitable, because it was quite generally found among Rome's Italian and Greek neighbors.<sup>12</sup> In this sense the *ius gentium* could be appealed to in the urban prætor's court, as well as in that of the peregrine prætor. It was evidence of the *bonum et æquum*. It may well be that the capital innovation of the prætorian title was consciously based on the *ius gentium*.

## THE BEGINNINGS OF JURISPRUDENCE

19. Expert legal assistance was given by men of experience in pleading (*agere*), advice (*respondere*), and conveyancing (*cavere*).

The first law book giving the results of such experience was the *Tripertita* of Sextus Ælius (about 200 B. C.), which contained the XII Tables, commentary, and the *legis actiones*.

Another important element in Roman law grew to notable proportions in this century (243 B. C.–150 B. C.). Corunca-

<sup>12</sup> It is very easy to exaggerate the influence of Greek legal ideas on the Roman law at this stage of its development. The Romans themselves, at a later period, were prone to assign minute local regulations to the imitation of Greek models. Institutions and legal concepts of Greek and Oriental origin were freely "received" in Rome as the Empire gradually became organized into a real state, but the presence of such ideas in the pre-Augustan community is extremely doubtful.

nus had publicly given advice to litigants (cf. *supra*, § 15), and others followed his example. Law exercised its fascination in men's minds, and to be known as experienced in it, to be a *iuris peritus*, a *iuris prudens*, was a title of considerable distinction. The functions of these jurists were, in later times, classified as those of pleading, advising, and conveyancing—*agere*, *respondere*, and *cavere*. They framed the *legis actio* and *formulae* and perhaps coached the litigant in what he had to say and do. They replied to questions as to whether under a given state of facts the claimant may confidently suppose he had a *ius*. They examined and drew up memoranda of transactions which might lead to future litigation.

The services of these men—who were always actively engaged in public affairs as well—were as much in demand by a praetor who was in doubt as by a litigant who wished to assert a claim. Frequently the magistrate was himself an experienced jurist, and in certain great families the tradition of special interest in such matters began to be maintained.

Indeed, one of the first of these jurisprudents, Sextus Aelius Pætus Catus, put his wisdom into a book, which may well have been the first law book of Western Europe. It was called—the title is, of course, much later—*Ius Aelianum*, or *Tripertita*. It contained the XII Tables, their “interpretation,” and the list of *legis actiones*. By “interpretation” doubtless was meant that the archaic words were explained, and perhaps that the sense was made clear by illustrative examples.

Aelius was consul in 198 B. C., and was an intimate friend and close associate of the Scipio who defeated Hannibal. He was, besides, a patron of letters and an active spirit in the ruling oligarchy. His father had been pontiff. Perhaps he was also of the college. The family had a reputation of being rationalists. We shall understand both his desire to write a book and the kind of book he wrote, if we remember that the mental cultivation his coterie enjoyed was Greek, and was dependent on the dominant Alexandrian school, where “interpretation” of ancient documents had been carried to a high pitch, and where treatises on

law were no novelty, as, indeed, they had not been in the East throughout the fourth and third centuries, the period of Plato, Aristotle, and Theophrastus.<sup>13</sup> But the Roman law books, which began with the *Ius Ælianum*, and of which the series may be said to have been continuous ever since in Western Europe and America, had the special characteristic that they were directed to a professional public, and were not designed for general edification.

### THE FORMULARY PROCEDURE

20. The *formula* was made permissive in all courts by the *lex Æbutia* and finally was made obligatory by the Julian laws.

The parts of the *formula* were: (1) *Nominatio*; (2) *Demonstratio*; (3) *Intentio*; (4) *Condemnatio* or *Adiudicatio*.

Between the last two might come *Exceptio*; *Replicatio*; *Duplicatio*, etc.

An illustration of a suit under the *formula*: An action for a loan to a *filius familias*, to which are pleaded defense, reply, and rejoinder.

The century of revolution in which the Mediterranean world stormily worked out a temporary plan of organization saw the complete triumph of the *formula* over the *legis actio*. In spite of the rigidity and complexity of the latter, it was still largely used, and as late as Cicero's time must have been familiar to most

<sup>13</sup> Plato (427-347 [?] B. C.), in his *Republic*, and particularly in his *Laws*, probably his last work, attempted to organize a model state in considerable detail. Aristotle's (384-322 B. C.) lectures on *Politics* are much concerned with public law, and in preparation for his theories he had studied the actual constitutions of one hundred and fifty-eight Greek states. Only one of these, the "Constitution of Athens," has come down to us, and that has only recently been discovered in the papyri. Theophrastus (372-287 B. C.) wrote a book, *On the Laws*, of which a few fragments have been preserved.



Romans. Otherwise, Cicero's jibes about it in his oration for Murena are wholly pointless.<sup>14</sup> But in the bad times of the second and third Civil Wars, the quicker and more varied *formula* ousted the older procedure completely, and for all but a small type of actions the *formula* was made obligatory by statutes passed either by Cæsar or Augustus.

The *formula* consisted of several parts: First of all came the appointment of a *iudex*. Then comes the statement of the facts, which are either admitted by both sides, or found by the prætor to be the basis of the controversy. This is the *demonstratio*. In the following part, the *intentio*, the issue is stated. Then in the *exceptio*, *replicatio*, *duplicatio*, there were successive pleas in avoidance by defense of plaintiff.

Finally, the *iudex* is instructed to condemn or acquit the defendant in accordance with the proof advanced for the various pleas and counter pleas.

In certain actions, of course, no condemnation is necessary, since both parties seek merely an adjustment of mutual claims. In these, accordingly, an *adiudicatio* takes the place of a *condemnatio*.

The constitution of the *formula* can best be seen by illustrations, one of which involves a much later situation than that of the period we are discussing. To understand it, it is merely necessary to state that an imperial statute, the *senatus consultum Macedonianum*, declared loans to a *filius familias* void. A number of exceptions, and exceptions to the exceptions, had grown up in practice.

It may be noted that, in all examples of *formulae*, the plaintiff is called *Aulus Agerius*, abbreviated A. A., the equivalent of John Doe, and the defendant is called *Numerius Negidius* (N. N.), the equivalent of Richard Roe.

Let us assume the following facts: A. A. has lent to N. N. 500 hs. for one year and has entered into a formal contract for 1 per cent. monthly interest. At that time N. N. was a *filius fami-*

<sup>14</sup> Cicero, Pro Murena, 12 et seq.

*lias.* A. A. claims that he informed N. N.'s father of the transaction and the latter approved of it. A. A. asserts that N. N. had secured this approval by fraudulent representations.

*In Iure.*

The prætor, after hearing the discussion and examining the *formalæ* both sides have proposed, dictates the following one:

1. *Nomination*: Let Titius be *iudex*.
2. *Demonstration*: Whereas, A. A. has lent to N. N. 500 hs., to be repaid on the last Ides; and whereas, N. N., in reply to A. A.'s stipulation, has promised to pay in addition 1 per cent. per month in interest;
3. *Intention*: If it appears that N. N. ought to give to A. A. 560 hs.
4. *Exception*: Unless it appears that at the time, as provided in the *senatus consultum Macedonianum*, N. N. was a *filius familias*.
5. *Replication*: Unless it further appears that the father of N. N. was informed of the loan and approved of it.
6. *Duplication*: Unless it further appears that this approval was secured by the improper practices (*dolus*) of A. A.
7. *Condemnation*: Do you, *iudex*, condemn N. N. to A. A. in the amount of 560 hs. If it does not appear, acquit him.

*Formula with Adjudication.*

The joint heirs of Lucius Titius wish to have the estate divided.

*Actio Familiæ Ercisundæ.*

*Nomination*: Let Sextus Ælius be *iudex*.

*Demonstration*: Whereas, the heirs of Lucius Titius have demanded that a *iudex* be appointed for partitioning the estate, and in regard to what in such inheritance has been done or undertaken by any one of them after he became heir;



*Adjudication* : Whatever part ought to be adjudged to any one of them, do you, *iudex*, adjudge it; and whatever in good faith one ought to render to the other in the premises, condemn that one to render it; if it does not appear, acquit him.

Similar adjudications were found in actions for dividing partnership property (*communi dividundo*) and for settling boundary disputes (*finium regundorum*).

### THE WORKING OF THE FORMULA

21. The *formula* was of almost unlimited flexibility. That of itself did not involve the creation of new *iura*.

New *iura* might, however, be created by fictions for which the *formula* lent itself readily.

The formulary procedure presents close analogies to common-law pleading. The difference was that the *formula* was oral and more expeditious.

Just how the *formula* worked we must stop to examine. One thing it had in common with the *legis actio*. The proceedings were initiated by a summons *in ius* before the tribunal of the prætor. Here the selection of a *formula* was made, of which the essential part was the nomination of a *iudex* or *iudices* to try the issues framed. The panel of *iudices* was larger than before. It included, not only the senators, but men belonging to the two census classes just below the senate—classes created by property qualification. But the underlying idea is essentially the same as in the *legis actio*. The *iudex* is instructed by a magistrate possessing *imperium* to determine a controversy and render the appropriate decision for which the support of the magisterial power is in advance assured, as far as it is necessary.

When the *formula* was complete, the prætor had no further function to perform, and the proceeding *in iure* came to a

close. The formal closing was given a technical name, *litis contestatio*. For a very long time in Roman history *litis contestatio* effected a complete novation in the sense of the Civil Law. It extinguished whatever claim or counterclaim existed between the parties as the result of the facts stated in the *demonstration*, and substituted for such claims a wholly new one, to wit, that which the *iudex* in his judgment might grant in accordance with the *intention* and the qualifying *exceptions*.

The parties are now before the *iudex*, *apud iudicem* or in *iudicio*. It must be remembered that the *iudex* was a private citizen, selected from a panel which was generally determined by property qualifications. He was in most cases not a lawyer. He could, however, secure the assistance and counsel of those who were trained lawyers, and in most cases we may be sure that he did so, since the determination he was required to make demanded considerable legal knowledge. However, he was not obliged to go outside of his unaided discretion. If he chose to run the risk, which a willful or negligently wrong decision entailed, there was nothing to prevent him. But the risk was a real one, since he was liable in tort for the consequences of an erroneous decision. Not only did the *iudex* have an opportunity of securing learned advice, but the parties themselves often furnished him with guidance. They might enlist the services of professional advocates, or obtain the written opinions of eminent counsel. The *iudex's* decision, moreover, even if he was corrupt or incompetent, was final. There was no appeal.

Two of the *legis actiones*—and perhaps the two oldest ones—seem to have been means of execution. (Supra, § 11.) But the *formula* fell far short of that. When the *iudex* had given his judgment, a successful plaintiff had to take further steps, if he wished concrete satisfaction, unless the condemned defendant of his accord rendered it. We may suppose that the defendant often did so, but there must have been many cases when some process of execution would be necessary.

The *legis actiones*—*l. a. per manus iniunctionem* and *l. a. per pignoris capionem*—were probably processes of arrest and at-

tachment. Arrest and attachment remained for some time the means by which a successful plaintiff satisfied the judgment he had obtained, and their existence provided strong pressure to induce the condemned defendant to give the satisfaction to which he was condemned. If the plaintiff chose to execute against the body of the defendant, he had himself to furnish the prison and the maintenance, as in the days of the *nexi*. (Infra, § 54.) Wealthy creditors could do this, and could use the labor of their debtors in lieu of payment of the debt.

Apparently in order to obtain the right to arrest a debtor the plaintiff had to bring a new action, the *actio iudicati*. This had the characteristic, which other actions also possessed (infra, § 49), that, if the defendant let it come to trial and lost, the judgment was double. Evidently the only defense to the *actio iudicati* was lack of jurisdiction or error of form. It resulted, not in another condemnation, but in a magisterial order of arrest.

But execution against the property was much the more common form. The plaintiff obtained an order which put him in possession of all the debtor's property, *missio in bona*, which was then announced for sale and sold at public auction, generally to the purchaser who promised the largest dividend. This could be repeated against subsequent acquisitions of the defendant, except that he was allowed a certain exemption, the *beneficium competentiæ*, up to the amount needed for his maintenance. (Infra, §§ 96, 115.)

This forcible method of execution could be lightened by the debtor's own act. He could make a general assignment for the benefit of all his creditors, *cessio bonorum*, a sort of voluntary bankruptcy (infra, § 115), which would result in the same form of public auction as in the case of execution. But very early in the Empire it had an important advantage for the debtor. Body execution could not be used against him, if he made such an assignment. The situation, therefore, of an unsecured creditor at Rome was, for the longest period in her history, very much the same as in most modern countries. A claim against an insolvent

debtor is simply a commercial misfortune, which, in the end, must be regarded as the inevitable risk of economic life.

The possibilities of *formula* system are apparent. It is above all indefinitely flexible. There is no issue, upon which a claim could be made, which could not be framed in the *formula*. There were no set words, no fixed hieratic gestures. In this, perhaps, the *formula* had carried to completion what the last phase of the *legis actio* had already commenced. Nor are we to suppose that, in the early decades of this revolutionary period, *iura* unknown and unheard of were enforced in the frame of the *formula* by any one who felt himself wronged. On the contrary, most prætors would demand as clear an authentication that a *ius* existed as they did before the Æbutian law, and as at all times they would accept as such authentication chiefly the proof that such a claim had already been admitted in favor of one Roman against another.

But what could be done is shown by what was promptly accomplished. The fiction which, in the classification of Sir Henry Maine, is declared to be the oldest and clumsiest mode of developing law,<sup>15</sup> was in the Roman system a later growth than equity or reformatory legislation, and became a supple instrument in the hands of the magistrates. The prætors had protected possessors in good faith and for value against disturbance by the simple act of denying the *legis actio* to an aggressor. It may be that he had to use something very like a fiction to enable such a bona fide possessor (bonitary owner) to recover his property. Perhaps the last of the *legis actiones* enabled him to do this.

But in the *formula* the fiction had a much wider range.<sup>16</sup> A bonitary owner, who sued for the recovery of his property, could by a slight change in the *intention* be put on a par with a Quiritary owner, or a pledgee might regain possession wrongfully interrupted. An heir, who had omitted certain formal-

<sup>15</sup> Maine, H. Sumner, *Ancient Law*, c. II (Pollock's Ed.).

<sup>16</sup> G. 4, 32-38.

ities, or who owed his inheritance entirely to prætorian intervention, might be secured in this estate. It was merely necessary to add to the intention: "If it appears that A. A. would be entitled if he were the Quiritary owner," "if it appears that A. A. would be entitled if he were the legal heir."

The analogy between the formulary procedure and common-law pleading lies at hand. But the differences are important, and are in general in favor of the Roman system.

In the first place, it was essentially oral. The debates and discussions before the prætor were by parol, and not by written declaration, to be met by written plea, and so on indefinitely. The only thing written was the *formula* itself, which was in theory and effect merely the instruction of the *iudex* and the warrant of his judgment.

Again, in spite of the power given the English chancellor by the Statute of Westminster to frame new writs in *consimili casu*, the number of such new actions was, after all, only slightly increased.<sup>17</sup> It was a more serious matter that in England each action, new or old, soon became fairly rigid in itself, and an error in selecting the right action was curable only with great difficulty, if at all.

Finally, it will be noted that what in the common-law procedure was accomplished by successive written pleas, with an appreciable term between each, was done in the *formula* by parts of one brief written plea prepared at a single time with the concurrence of the parties.

<sup>17</sup> Statute of Westminster II, 13 Edw. I, c. 24 (1285); Jenks, Short History of English Law. p. 46; Holdsworth's History of English Law (3d Ed., 1923) i, 398, note 3, ii, 300.



DEVELOPMENT OF THE *FORMULA*

22. (a) The Roman *utilis actio*, "adapted action," was very like the English "action on the case." The latter may have been modeled on the former.
- (b) The *formula* might name one person as obligee in the *intentio* and another as obligee in the *condemnatio*.
- (c) The "arbitrary proviso" allowed the *iudex* large discretion in estimating the penalty, if the judgment were not paid. It was, however, not like the injunction, or order of specific performance, sanctioned by imprisonment.
- (d) The *actio in factum* might disregard even analogy in allowing a new claim.

There is, however, one particular instance in which the history of the two forms of procedure show a remarkable parallel. All students of English law are acquainted with the manner in which the Action of Case developed—in its various forms of Trespass on the Case, Deceit on the Case, and so forth. More than thirteen centuries earlier, the prætor at Rome devised what was called the *utilis actio*, the "adapted action," to serve the same purpose. One example must suffice:

Under an ancient statute, the Aquilian law, an action had been available to one who caused another injury, by making a direct attack *vi et armis* upon his chattel or person. Suppose the trespass were accomplished indirectly, as when an animal was frightened off a precipice by shouts. The statute did not cover the case. The prætor, however, "adapted" the action, and allowed an *utilis actio legis Aquiliæ* to the injured party.

It is quite possible that, in this particular resemblance between English and Roman pleading, we have an example, not of parallel development, but of conscious borrowing, since those who framed the writs of "case" were men who might well have had an elementary knowledge of Roman law. But it is not cer-



tain that they used this knowledge, and the action of "case" may be adequately accounted for out of the circumstances from which it grew, without assuming borrowing.

Another type of expansion to which the *formula* readily lent itself may be seen from a wholly different example. Suppose the receiver of an insolvent's estate wished to sue on a claim of the insolvent. He could, of course, be given a *formula* with a fictitious clause, in which the *iudex* is instructed to give judgment for him, "as though" he were the heir of the insolvent, the real creditor. But another way was to proceed somewhat as follows. After a *demonstratio* which stated the facts on which the claim of the insolvent was based, the *intentio* might state: "If it appears that N. N. owes S. (the insolvent) 1,000 hs., do you, *iudex*, condemn N. N. to pay 1,000 hs. to A. A. (the receiver in bankruptcy)." Out of this power to name one person as obligee in the *intentio*, and another person in the *condemnatio*, assignment and agency were ultimately developed, and the difficulties which courts in England and some in America have not yet surmounted, that of enabling an assignee or beneficiary to sue in his own name, were early overcome at Rome.

Another possibility of the *formula* is illustrated by the so-called *clausula arbitraria*, the "arbitrary proviso."<sup>18</sup> To secure certain specific acts, or in certain actions of tort to compel reparation, the defendant was condemned in an indefinite sum, which was either the multiple of the damages, or an amount left to be determined by the *iudex* as a penalty. The effect seems to have been that a defendant might by a prompt satisfaction avoid a large penalty, and the "arbitrary proviso" was therefore used to exercise a certain pressure on the defendant. We must, however, not confuse this pressure with what in our practice is accomplished by specific performance or by injunction. The drastic sanction of these Anglo-American actions—in some cases imprisonment until the order is obeyed—did not exist at Roman law. The condemnation threatened was larger in amount, if the

<sup>18</sup> I. 4, 6, 31; D. 13, 4, 2, pr.

arbitrary proviso was disregarded; but it was a condemnation of the same kind as in any other action and was enforced in the same way.<sup>19</sup>

But the *formula* could stretch still further. It was very possible that a state of facts might bear too remote a resemblance to an accepted kind of action to make it the basis even of an *utilis actio*, an adapted action. In that case—very soon after the Revolutionary Period, if not within it—it was possible to disregard analogy, and to let the action stand on its own merits, an *actio in factum*. That is, the *demonstratio* and the *intentio* were practically the same, or, better, the *demonstratio*, instead of referring to the transaction by some such well-known name as “loan,” “sale,” etc., was forced to give the facts in detail without classifying them. The *index* was then called upon to give a specified judgment, if certain facts appeared.

And yet analogy was certainly not disregarded. A state of facts wholly at variance with any state of facts which had before given rise to an action would not seem to a prætor to constitute a *ius*, and would not justify the issuance of a *formula*.

### EXTRAORDINARY REMEDIES

23. These were created to protect minors and to protect possession.

- (a) *Restitutio in integrum*. A minor who had made an unprofitable transaction was restored as far as possible by summary process to the situation before the transaction. This was extended to cases of fraud for all persons.
- (b) Interdicts. Orders of the magistrate, both negative and positive, were issued to prevent disturbance of the peace and compel the resort to legal methods of ouster.

<sup>19</sup> D. 6, 1, 70; 25, 2, 9.

If an interdict was disobeyed, it gave rise to a complicated legal procedure.

There were many interdicts, the commonest of which received definite names.

The protection of young people against unprofitable transactions was the theme of a law called the *lex Plætoria*, passed somewhere about 200 B. C., and therefore in the very heart of the period which witnessed a remarkable progress in law (supra, § 18). But this Plætorian law merely declared that contracts made by persons under twenty-five were voidable. This was so inadequate that the prætor intervened. He not merely allowed a minor the exception of the *lex Plætoria*, but undertook as far as possible to see that he was put into the position in which he had been before the detrimental transaction took place. The procedure received the technical name of *restitutio in integrum*.<sup>20</sup> It was not a trial. It had no *formula*, and no *iudex* was appointed. Still a hearing was granted to the persons affected, and, as far as possible, property which the minor had disposed of was restored to him, without regard to the fact that titles had to be set aside in order to do so. The remedy was drastic and was highly popular. In the Revolutionary period it developed in a number of ways, which will be set forth later.

The intervention of the powerful *imperium* in such situations was marked by another fact, destined to grow into a still more important element in the Roman system, the interdict.

The interdict was a negative command. Just as the tribune of the plebs by pronouncing the word "*veto*"—"I forbid"—could halt any act of a magistrate or any public deliberation, so a standing *formula* in most of the interdicts was *vim fieri veto*, "I forbid the use of force." Something like an interdict, something like a warning to a suspect by the magistrate that dis-

<sup>20</sup> Plautus, *Pseudolus*, i, 3; Cicero, *De Natura Deorum*, 3, 30; D. 4, 1; C. 2, 21.

turbances would not be tolerated, must have been very ancient, and interdicts are certainly older than 200 B. C.

The analogy with the English injunction is apparent. And, as in the case of the *utilis actio*, it may very well be that the first chancellor who enjoined the threatened commission of an irreparable wrong was thoroughly familiar with the fifteenth title of the fourth book of Justinian's Institutes, "On Interdicts," and consciously did in the name of his royal master what the Roman magistrate was empowered to in virtue of his *imperium*. But it is just as likely that it was an independent growth.

One very marked difference is the later development of the two forms of procedure. We remember the difficulty which the English chancellor found when he attempted to secure the specific reparation of torts by means of an injunction, and Eldon's ingenuity, which reached an affirmative command by means of denying a negative. The prætor had no difficulty in turning his prohibition against violence into an order to restore the situation disturbed by violence. These positive orders were also called interdicts. There was indeed the power of issuing *decreta*, unmistakably positive commands, and we have a number of examples of such *decreta*; but it was not these, but the interdicts, which multiplied apace, until later all examples of the type of judicial order were classed as interdicts.

The most usual purpose of the interdict was to secure possession. The idea of possession as something which created *iura*—of a kind—had been developed, as we have seen, by the prætors in the second period of Roman history (*supra*, § 2); but it was a possession which was meant to be as good as *dominium*. What the interdicts reached was a possession that was not as good as *dominium*, and did not profess to be. After all, the possessor, even without any real claim, had a better right than a nonpossessor, equally without claim. And again, where an orderly method of vindicating one's *ius* to a thing was available, it was not to the public interest to permit violent self-help, which could not be distinguished from wrongful aggression.

A great many interdicts were utilized in certain constantly recurring transactions, and had been so often employed that they had a set *formula*, which many people knew, and which soon appeared regularly in the prætor's edict. These interdicts themselves were known by the opening words of these *formulas*—such as *Quorum bonorum*, *Utrubi*, *Uti possidetis*, *Unde vi*, etc.; but the list of these *formulas* was far from exhausting the number of possible interdicts. These were as various as the situations they sought to remedy. Attempts at classifying them were made principally for the purposes of exposition.

Just as in the case of the *restitutio in integrum*, the interdict itself was not a trial. It was made upon investigation, *causa cognita*, but it might be interlocutory. There was no summons *in ius*; no debate and submission of disputed issues. But what if the interdict was disobeyed? An open defiance of a magisterial order—especially of a magistrate whose lictors could seize the offender—need not be thought of. The words of the interdict were general. They were addressed to all persons. They were qualified by certain conditions. The persons involved might deny that their acts constituted an infraction of the interdict, or that the conditions had been fulfilled. In our procedure of injunction, the enjoined party does the act, and runs the risk of being imprisoned or fined for contempt of court. He is cited, in fact, to show cause why he should not be punished.

Now, in the Roman interdictal procedure, no such drastic sanction was available. We are told in some detail what was done when the claim was made that an interdict had been violated. A formal suit was instituted, and with the most involved and complicated incidents, compared with which the *legis actio sacramento* was relatively simple. It had the elements of a wager, just as in the *sacramentum* (supra, §§ 11, 12). It added to it a system of public bidding, whereby the highest bidder obtained the desirable situation of defendant, and in the case of certain so-called “double” interdicts there was a double trial, in which the plaintiff and defendant changed places. In



many cases, it is quite impossible to see why the persons claiming the violation did not sue in the ordinary *formula*, and in some instances we are told they did. Of course, there were situations in which the ordinary *formula* would not lie, as when a person who was a possessor indeed, but had no title, was ousted by another who equally had no title.<sup>21</sup>

Perhaps the action to enforce an interdict was not so common at any time as our account might lead us to suppose. At any rate, it disappeared when the formulary procedure itself was superseded, and it is not likely much use was made of it after the middle of the third century A. D.

## JURISPRUDENCE OF THE REVOLUTION

24. New *iura* were introduced by magistrates, based on the *ius gentium*, and enforced by new actions.

The real source of new law was the rising science of jurisprudence. Two of the many jurists of the day were:

- (a) Quintus Mucius Scævola, whose system of civil law was a standard manual for several centuries;
- (b) Gaius Aquilius Gallus, a great practitioner, whose introduction of remedies for *dolus* (fraud) introduced equitable considerations into all types of claims.

Both these men were trained in Greek as well as Roman schools.

The century of revolution, in which the *formula* became completely triumphed, which carried the extraordinary remedies of restitution and the interdict to a very high degree, was also the creator of *iura* by the vast expansion which this new procedural development gave to the intervention of the prætor.

Whatever may have been the situation in other communities, it was never the theory at Rome that an exhaustive list of *iura*

<sup>21</sup> Buckland, Text-Book, pp. 723-739; Girard, Manuel, pp. 1118-1126.



could be drawn up. The doctrine that the law had gaps—so modern in its sound—was, we may say, taken as a matter of course. We do not find in Rome the jealousy of reformatory legislation that was so marked a characteristic of Greek communities. In some of these, we are told, the proposer of a new law did so at the risk of his life, and was at once executed if the law did not pass. Even in Athens, a man who had succeeded in having a law passed was subject to indictment, and was punished if, in the opinion of the jury that tried him, the law was contrary to the spirit of the Athenian constitution.

Nothing of this kind was known in Rome. To be sure, the traditional right, the *mos maiorum*, was treated with great respect; but innovations by regular means were never considered unpatriotic or irreligious. In early times, it is true, access to the enforcer of *ius* was rendered difficult by the *legis actio*. As soon as access was facilitated, new forms of *ius* were demanded with increasing freedom. The independent intervention of the prætor's *imperium* to effect restitution and to prevent arrogant wrong was, we must remember, a well-known thing at an extremely early period.

Now the source of new *iura* may be said to be the *ius gentium*, if we will take this difficult term with the qualifications mentioned above (supra, § 17); that is, it was the prætor's sense of what was right and fitting, authenticated by the practice of other communities, or by the general standards of his own day, of which he would be as well aware as any one else. One of these standards was respect, without superstitious veneration for the *mos maiorum*. It was consequently only when an abuse was fully and quite generally recognized as such that the prætor would interfere to enforce a *ius* that no one had enforced before him.

The extent to which he would do that depended largely on the kind of person he was. By this time there were many prætors, but most of them were administrators of Rome's foreign dependencies. It was only the urban or the peregrine prætor who had a direct opportunity to introduce new *iura* by

allowing new actions, and these prætorships were obtained by drawing lots among the eight or ten of any one year. Newly introduced types of actions were later known by the names of the prætors who first allowed them. Thus we have the Publician action, and the Salvian interdict, after some Publicius or Salvius, who may have been urban prætor in this century between 150 and 30 B. C.

As a matter of fact, however, the actual introduction of such an action often gave fame to the magistrate beyond his deserts. The Publicius or Salvius in question was in all likelihood an average official, who happened to have followed the advice of learned counsel, as it was becoming his recognized duty to do. And such learned counselors in legal matters were now a well-known profession. The series of professional lawyers that may be said to have begun with Coruncanus, and to have become of permanent influence with Sextus Ælius (cf. *supra*, §§ 15, 19), was represented in this century by a large number of distinguished names. Two, at least, must be specially mentioned.

One was Quintus Mucius Scævola (circa 95 B. C.), the teacher of Cicero. He made the first effort at systematizing the existing law in a more or less scientific fashion. The arrangement of Ælius was a rudely practical one, resembling in function the abridgments that served our ancestors from Brooke to Viner. That of Quintus Mucius was notable for its attempt at classification. Perhaps we owe the divisions of law into the law of persons, of things, and of actions to him. At any rate, he had an enormous influence, and he trained a generation of brilliant lawyers and advocates. It held a position in later law somewhat analogous to that of Coke's Commentaries in modern Anglo-American law.

It is characteristic that he was a Stoic. Sextus Ælius, one hundred years earlier, had been trained in what was then the new Greek learning. Mucius had not only had a thorough training in an even more sophisticated age, but, as most educated men of his day, he had espoused with ardor one of the

many contending philosophical schools. That is equivalent to saying, in our terminology, that he went to a Stoic university, rather than an Epicurean or Peripatetic one, if we remember that one "school" taught in conscious opposition to the others. The Stoics, of whose general point of view we shall have to speak hereafter, laid far greater stress than the rival schools of their day on definitions and classifications, on analysis and systematizing; but their classifications and analyses were applied to human concerns, rather than to abstract mathematics. We can hardly do otherwise than see, in what was obviously the first general presentation of Roman law, the earliest contribution of the Stoic philosophy to the law.

The other name is that of Gaius Aquilius Gallus, Cicero's colleague and friend, and, like him, the pupil of Mucius. Less of a writer than Mucius, he was a vigorous practical lawyer. To him, above all, is due the introduction of the action and exception of *dolus*—a term which combines the ideas of fraud, abuse of right, and the general concept of tort. The effect of it was far-reaching. It introduced equitable considerations into determining the validity of transactions, and in practice enabled equitable defenses to be pleaded in almost any action.

## LEGISLATION UP TO THE END OF THE REPUBLIC

25. A number of statutes had been passed in earlier periods, freely modifying the civil law. During the Revolution, statutes were largely police measures and dealt with crimes.

Steps were taken to codify the criminal law in the Cornelian laws. The *quæstio* was introduced for criminal trials.

In the Revolutionary period, legislation gave way to magisterial action as a means of legal development. The great mass of statutes of this period are concerned with police and politi-

cal matters, as the character of the time might lead us to suppose.

Beginning with the third period of our historical survey (supra, § 3), a very considerable number of important statutes were passed creating and limiting private *iura*. Besides the *lex Æbutia* and *lex Platoria*, which have already been mentioned, there were the Aquilian, Cicereian, and Cincian laws, all of which remained in force for centuries. But most of the statutes of this period created a definite type of criminal procedure and also made considerable progress in the codification of criminal law. That is particularly true for several laws of Sulla (supra, § 4), known as the Cornelian laws, after the family name of the dictator.

The preservation of order in a great city could scarcely be left to the discretionary police supervision of a small number of magistrates. A great many crimes were defined, classified, and the punishment specified. The determination of guilt or innocence was made in a formal trial, in which some citizen appeared as accuser, and the final decision rendered by a panel of *iudices* chosen equally from the three highest census classes; these classes being arranged in accordance with a property qualification. The magistrate had merely the function of constituting the *iudicium* and presiding over it. There was no appeal. The entire trial, as well as the court which administered it, was called a *quæstio*.<sup>22</sup>

The new element, which the multiplication of *quæstiones* introduced, was an approach to the principle that criminal accusations could be made only for clearly specified and known crimes—the principle phrased in modern European law in the words "*nulla pœna sine lege*." In private law, no list of *iura* could possibly be exhaustive, and in the large and admitted gaps the prætorian *imperium* operated freely. But in criminal law the same equitable considerations tend to the opposite result. The published list of indictable offenses ought to be very nearly

<sup>22</sup> Cf. Mommsen, *Strafrecht*, p. 187 et seq.

exhaustive. Yet even here the magisterial *imperium*—supplemented in this case by the powers of other and subordinate officials—retained the capacity to interfere drastically and immediately to prevent open disorder and enforce obedience to commands.

We may sum up the Revolutionary period of legal development by saying that, during it, the private law owed little to legislation, but that it received an enormous impetus from the growth of the prætor's functions, to which the new procedure of the *formula* and the expansion of the extraordinary procedure of interdicts and restitution gave large opportunities. The concrete result of this impetus, however, owed something to the personality of the magistrates, but much more to the rapidly growing body of trained jurists, who put into both *ius civile* and *ius honorarium* more fully than ever before the sense of equity which they found in their own ethical philosophy and in the *ius æntium*.

## LEGISLATION IN THE EARLY EMPIRE

26. Legislation was active in civil and criminal matters under Augustus.

Legislation by statute continued in the first century A. D., but the *senatus consultum* was found more convenient.

The *senatus consultum* was properly a resolution of the senate addressed to the magistrate's discretion. It was obeyed in fact by magistrates, who were themselves senators or who dared not offend the senate.

In the Empire, the *senatus consultum* was passed with the consent, express or tacit, of the emperor, and therefore engaged his authority.

The before-mentioned *senatus consultum Macedonianum* illustrates how these ordinances were treated.



The fifth period of Roman history covers the two and a half centuries in which the Augustan principate gradually gave way to Julius Cæsar's model of a closely-knit monarchy. The *princeps*, as Augustus conceived him, was a magistrate with a *super-imperium*, outranking all existing magistrates, and freed from the check of the tribune's veto, by the simple process of having in himself a superior tribunician power. The existence of an *imperium* of this kind exercised, as might be supposed, a tremendous influence on the growth of law.

There was, first of all, a great deal of reformatory legislation, as in the third period of Roman legal history. The criminal and police regulations were codified anew by Julian laws, which supplemented the Cornelian criminal statutes (*supra*, § 25). But a large number of new laws, some introduced by Augustus himself, others stimulated by the spirit of the new constitution, dealt with many aspects of private law. The testamentary trust, the validity of codicils, the protection of the heir executor's interest, were momentous changes in the most conservative of legal institutions—the law of succession. Family status and the legal privileges concerned with it were regulated by laws governing divorce, encouraging marriage, and restricting manumission of slaves.

Very early in the principate, however, the statute-making machinery shows unmistakable signs of exhaustion. The last formal statute is a Cæcilian law of 90 A. D., which deals for the tenth or twentieth time with that most troublesome of all European matters—the agrarian question.<sup>23</sup> But for a generation before that there had been little or no legislative enactments, and there were destined to be none until two hundred years later; that is, we must wait for the time of the absolute emperors of the Diocletian reorganization (*supra*, § 6) to

<sup>23</sup> D. 47, 21, 3, 1. All known Roman *leges* are given in a chronological order in G. Rotondi, *Leges Publicæ Populi Romani*, Milan, 1922. Cf. corrections by V. Arangio-Ruiz, in Rotondi, *Scritti Giur.*, I, Intr. Milan, 1924.



meet again general and universally binding decrees issued by a sovereign authority.

A great many of the functions of the statute were assumed by the senatorial resolution—the *senatus consultum*. As has been said (supra, § 7), this was, in theory, merely a resolution of advice to the magistrates, which they were at liberty to ignore. It was usual to add to the formal words, in which the magistrate was urged to carry out the wishes of the senate, the qualification, *si eis videretur*—"if they see fit"—a qualification so common and so much a matter of course that it was regularly indicated by the abbreviation, *s. e. v.* Even where it was omitted, it was implied. The magistrates were never made accountable to the senate. In the correspondence of Cicero, we have a number of decrees cited, which were violated with impunity by the very officials to whom they were particularly directed.

The point was, whether binding or not in theory, they could not in ordinary cases be violated with impunity. The magistrates held office for one year. They were life members of the senate. They were in most cases the sons of senators. They entertained a deep loyalty and respect for this body, of which they were part. And those few, in whom this respect was less marked, had to bear in mind the short life of their own authority, the dependence of their future careers on the good will of their fellows, and even the possibility they might be held to criminal account after their year had expired for misfeasance in office, and that they then would have to face a jury composed of the very men they had affronted. These facts sufficed to check all but determined agitators, and enabled the senate to become, during the third period of our historical survey (supra, § 3), the ruling body of the state.

In the first decades of the principate the situation was quite different, but the likelihood that a *senatus consultum* would be obeyed was as great as before, but for a very different reason. The senate, while still retaining the tradition of being a privileged order, and consisting, even if to a diminishing de-

gree, of descendants of the old privileged families, was in fact composed of nominees of the *princeps*. Most of its decrees were passed either at his instigation or at any rate with his acquiescence, since the redoubtable tribunician power, which was one of the characteristic constituents of the new imperial office, could have checked any act of the senate at any time. We may say, therefore, that a *senatus consultum*, in the time of Augustus and his successors, was an ordinance which to a greater or less degree engaged the authority of the emperor. It is easy to see that no imperial official would do otherwise than carry out its provisions as precisely as if it had been a statute, in spite of the fact that the form of the document still committed its execution merely to his discretion.

That the *senatus consultum*, and not the "law," became in this period the chief means of legislation, was brought about by the force of circumstances. The *princeps* might have utilized the people, if he had chosen, for this purpose. The popular legislature was dominated by imperial officials, and was as subservient as the senate. But it had dangerous potentialities, which were never forgotten. The senate, on the other hand, was more readily summoned, more conveniently managed, and far more easily controlled. Besides, of a certain mass of imperial business the *princeps* wished very much to be disburdened, and to commit it to a body like the senate was obviously a wiser course than to leave it to a large popular assembly, which at a crisis might become a seditious mob.

So we find the *senatus consultum* treated with the same regard by magistrates and citizens as a law might be. An example will illustrate: Either under Claudius (50 A. D.) or Vespasian (80 A. D.) a *senatus consultum* was passed forbidding the lending of money to a *filius familias*, an unemancipated son (cf. *infra*, § 38). This was the *senatus consultum Macedonianum*. The terms were apparently quite general, but, in effect, it meant that a prætor, to whom a lender applied for a *formula* in order to sue an unemancipated son, would insert in it an exception, the exception of the *scutum Macedonianum*;

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that is, the *iudex* was bidden render judgment for the loan, unless it fell within the prohibitions of the senatorial ordinance.<sup>24</sup>

It was the fact that in practice the *senatus consultum* was dealt with just as a law was dealt with, which made it a vehicle for legislation, although it is not likely that any specific constitutional action was ever taken to equate the *senatus consultum* with the law.

### THE JURISPRUDENCE OF THE EMPIRE

27. Augustus permitted jurists to respond "with imperial authority." This in fact made these *responsa* binding on the *iudex*. Law began to be formally taught. Labeo and Capito were the founders of rival schools, named Proculian and Sabinian, after later heads.

These two schools were later superseded by other schools throughout the Empire. The school at Berytus, in Syria, was the most famous of these. Legal literature increased rapidly. Handbooks (*Institutes*), Digests, systematized discussion, with citation of authorities, and commentaries were the commonest types of books.

The Civil Law of Sabinus was the standard text-book for many years.

Certain definite and specific changes in law and procedure were made in what might be called the consciously legislative process of the *senatus consultum*. But the most extensive changes were made, before and after, through the less conscious process which remains the life of the law.

Augustus permitted certain men of special learning to give answers *ex auctoritate sua*—"with imperial authority." All that this can mean is that, of the many professional lawyers some received from the emperor the right to speak as though

<sup>24</sup> Cf. *infra*, chapter VII, § 53.

it were Augustus whose legal opinion they were announcing. A litigant, therefore, who cited such an opinion before a *iudex*, could hardly help carrying conviction; and a litigant who cited such an opinion to one of the many prætors could scarcely do otherwise than persuade him that an action or an exception would lie, or that it was a proper case for interdict or restitution.<sup>25</sup>

A privilege so momentous put those who possessed it into a class quite different and apart from the other *iuris prudentes*. That any formal distinction was made in the title of the "patented" counsel is very unlikely. And it is obvious that their position did not resemble that of any group of lawyers now existing in any modern country, although it is somewhat like the position of judges in the common-law jurisdictions.

What happened when learned and equally privileged juriconsults differed? The emperor Hadrian (about 125 A. D.) took pains to reply to this question which had formally been put to him. In his reply he stated that in such a case the *iudex* might follow any opinion cited.<sup>26</sup> But obviously that is what a *iudex* pretty regularly did under such circumstances, long before the imperial authorization was signified. To have followed the decision of an adviser whose statement had the emperor's sanction would be a complete defense to a *iudex*, sued in tort for denial of justice (cf. *infra*, § 52, 3), and, where such advice was available, little use would be a defense.

Among the very first jurists who received the imperial license from Augustus were Marcus Antistius Labeo and Gaius Ateius Capito. Both were men of great reputation and ability. Labeo was apparently the bolder and more vigorous thinker, while Capito was the more ingenious, and also the one that enjoyed a higher degree of imperial favor. It is difficult to estimate precisely the exact contributions that either of them

<sup>25</sup> With this qualification we can accept the traditional account of what the license of Augustus accomplished. Buckland, *Text-Book*, p. 23 et seq.

<sup>26</sup> G. 1, 7.

made to legal doctrine, but it was customary to date from them the practice of teaching law in a more systematic form than was before attempted.

It is indeed very probable that the two "schools," of which the origin is assigned to Labeo and Capito, were schools in a literal sense. The model followed was that of the Greek philosophic schools, which had been in existence for three centuries as organized quasi corporations, of which the direction and management were transferred by one master to his successor. This type of organization was widespread throughout the Mediterranean, and a very similar one at this very time in Palestine was elaborating the series of decisions which form the text of the Jewish Talmud.

The history of the two Roman schools, as far as their succession of presidents is concerned, can be easily followed. The school of Labeo was under the leadership of the following men: Nerva the Elder, *Proculus*, Nerva the Younger, Longinus, Pegasus, Celsus the Elder, Celsus the Younger, Neratius. That of Capito, under the following: Massurius *Sabinus*, Cassius, Cælius, Iavolenus, Valens, Julian. This takes us to the time of Hadrian. At that time, the schools were known as the Proculian and Sabinian schools, after the men whose names are italicized, to whom the organization of instruction is probably due. After Hadrian, we still hear of Sabinians, to wit, Pomponius and Gaius (cf. *infra*, § 31, 1), but not certainly of Proculians. Some time before 200 A. D. both schools seem to have disappeared. But by that time there were many law schools in different parts of the empire, in Gaul and Spain and Africa, and above all at Berytus—the modern Beirut—in Syria. The school of Berytus rose into an ascendancy, which it maintained for fully four hundred years.

With the rise of systematic teaching in law, the juristic literature grows by leaps and bounds, and the types of literary activity of lawyers multiply extraordinarily. There are handbooks and law dictionaries meant for students, laymen, and practitioners; collections of *responsa* of the privileged juris-



consults; commentaries on specific laws, like the Julian and Cornelian laws, even of the Twelve Tables, and on the various edicts. Then there are books specifically designed for legal instruction, simple introductory manuals, often called *Institutiones* (Institutes), general treatises like that of Quintus Mucius (cf. *supra*, § 24), and finally systematic and thorough arrangements of the whole law, with emphasis on named authorities, which began to be known as Digests. Among the most influential of all these books was the treatise on the Civil Law written by Sabinus, which was widely used as a text for advanced instruction and for commentary, and which somewhat displaced the older similar treatise of Quintus Mucius. Roughly, the relation of the two was like that of Coke and Blackstone. In the third and fourth centuries, the Institutes of Gaius—written about 160 A. D.—became an almost universal text for elementary instruction in law.

Practically all of these books, except the Institutes of Gaius, have disappeared, and are known to us chiefly by the citations that appear in the great Corpus of Justinian and in a few later writers (*infra*, § 185, 2).

## EQUITY AND NATURAL LAW

28. *Ius* and the *bonum et æquum* (equity) are declared to be essentially the same by Celsus. The test of *bonum et æquum* is now frequently sought in a *ius naturæ*. This, no more than the *ius gentium*, was a body of doctrine, but an imagined ideal.

The *ius naturæ* was largely based on Stoic teaching, but not wholly so based.

The Stoic ideal was of a Cosmopolis governed by natural law and characterized by perfect equality. It was consistent with a practical system which contradicted this ideal, because practical systems could be treated as indifferent to a philosopher.



The mass of doctrine which these books contain is in no sense an application of a general philosophical or ethical or legal theory. It is, on the contrary, the rationalization of concrete applications. It is very decidedly a case law, in which the cases are related, classified, reconciled, and systematized. But the men who performed these services were, we must remember, men who enjoyed the general intellectual training of their time, and who were at some pains to put their decisions upon the basis of larger and larger general principles. *Ius* is still something which the claimant demands as his own, as his property, and for many centuries neither the prætor, nor the men whose advice he followed, were prepared to identify the *ius* which a given Roman citizen might properly claim as his with the ideally equitable thing based upon a course of conduct for all civilized men. Yet finally the identification was made. In the famous dictum *ius est ars boni et æqui*—"law is the art of doing equity"—we have something more than a rhetorical commonplace or a pious hope.<sup>27</sup> It was apparently first used by Celsus the Younger about 100 A. D., who was no bland philosopher, but a lawyer as famous for his rudeness as for his keenness.<sup>28</sup> *Ius* is no longer the means of securing *iura*. It is a technical device (*ars*) for the obtaining of equity, that which a good man's conscience will approve (*bonum et æquum*).

Just what will constitute equity, the *bonum et æquum*, will vary with the time and place and person, but a new responsibility is placed upon the magistrate. He must in most cases examine the moral basis of the *ius* claimed. That is *bonum et æquum*, which, if generally and frequently applied, will produce a maximum of advantage. In determining what would produce this result the prætor or the *iudex* was aided by the rapidly increasing mass of precedents, collected, discussed, and annotated

<sup>27</sup> D. 1, 1, 1.

<sup>28</sup> The famous *responsum Celsinum*, D. 28, 1, 27, to a question of a certain Domitius, runs: "Either I do not know what your question means or else it is a very stupid one."

in published books. To disregard them would have been a psychological impossibility, even for radical reformers, and radical reformers did not normally obtain *imperium* in the Roman Empire, and equally rarely obtained the *ius respondendi*, the privilege of answering with imperial authority.

The test of the *bonum et æquum* was now, as before, the *ius gentium*, the practice of civilized society, as far as the experience and imagination of magistrate or jurist taught him to believe that civilized society was in fact constituted. But a new test was beginning to be applied, that of the *ius naturæ* (*naturale*) the "law of nature"; that is, a practice which conforms to some philosophic theory of the universe, and especially to one particular philosophic theory, that of the Stoics.

For one reason or another a great many of the future jurists and magistrates of Rome were trained in Stoic schools. The "law of nature"—law in accordance with nature—was a familiar concept to many philosophic systems, but was one in which the Stoics were peculiarly interested, and about which they had much to say.

In some, at least, of the Stoic writings, we meet the concept of the Cosmopolis, a "City of God" or "City of the World," an ideal state, which was neither a past Golden Age nor a future Paradise, but wholly removed from limitations of time, and an actual contemporary fact for those who could enter it; and any one by an effort of the will could enter. It was in this ideal community that the law of nature prevailed, and this law was a law of perfect equality, in which what seemed to most men fundamental distinctions did not exist. Here, as in the City of God of St. Paul (Gal. 3, 28; Heb. 12, 22), there were no free or slave, no Greeks or barbarians, and no men or women.<sup>29</sup> The rules of conventional morality fared as badly as those of social differentiation, and opinions on these matters were gravely pronounced, which shock us as they shocked their own time.

Now, all this has a radical enough sound, and, if seriously car-

<sup>29</sup> Epictetus, 4, 1, 34; Plutarch, Mor. 329, A.

ried out, would have deliberately dissolved all existing political, economic, or social institutions. It did not, although a large number of jurists were Stoics, and a great many magistrates. Once, indeed, the supreme *imperium* of the *princeps* was held by a Stoic, Marcus Aurelius Antoninus (161–180 A. D.), a man of great practical wisdom and an almost unlimited philanthropy.<sup>30</sup>

But the Stoics had neither a completely consistent nor a fixed and unchanging doctrine. Many of them were rather muddle-headed, and the clearer thinkers among them were careful to push the troublesome and revolutionary conception of a perfect equality and a complete freedom from convention into the City of God, that natural state which lay just outside—but after all quite outside—the city of flesh and blood, of mortar and stones, in which men were in fact living. The citizen of the ideal city, the Stoic, was also a citizen of Rome, of Athens, or of Alexandria, and in the workaday community he had to adjust himself to an “unnatural,” because unphilosophical, surrounding. Here his duty was to “play the rôle to the end of the drama”—the term is taken literally from the Stoic preceptor of Marcus Aurelius—and play it, as a game, so long as it involved matters that were indifferent, such as wealth or poverty, illness or health, life or death, and cease to play it with a smile when it involved some act in moral contradiction with the law of that City of the Universe, the Cosmopolis, of which he was a real citizen.

This fanciful distribution of a man’s life would affect some men more than others, but in the case even of practical and responsible men it had one obvious result. It gave a certain direction to legal changes. The *ius naturale* was at no time a constituent part of Roman law, any more than the *ius gentium* was; but both of these vague terms enabled a Roman jurist to test the equity of the rule he was applying, and, where the result was

<sup>30</sup> His “Meditations” have been frequently translated. The most recent translation, together with the Greek text, is in the Loeb Classical Library, C. R. Haines, 1916.

notably inequitable, either or both justified him in deliberately departing from the rule. And at all times the actual law of Roman citizens was recognized as falling short of the perfect equity which could be attained only in an ideal commonwealth.

### THE NEW *IUS HONORARIUM*

29. The *ius honorarium* had been embodied in the prætor's edict. This was still chaotic and haphazard. Julian was commissioned by Hadrian (125 A. D.) to revise it. The *Edictum Perpetuum* is the result.

Julian's importance was high in theoretical as well as practical law.

A new birth is given to *ius honorarium* by the edicts and pronouncements of the new magistrate, the *princeps* (emperor). These pronouncements were mandates, decrees, rescripts.

Application to the *princeps* was made by petition, *libellus*, soon considered by a permanent council.

The general word for imperial pronouncement is "constitution."

The "speech from the throne," advocating a *senatus consultum*, is treated as the binding part of the ordinance, *oratio principis*.

The law of Roman citizens continued to consist of the *ius civile* proper, the law of statutes as the magistrates applied them, and the *ius honorarium*, the rules that were enforced by the magistrate in the exercise of his *imperium*. The prætorian part of the *ius honorarium* had by the time of Augustus already attained a large measure of fixity of form. The edict yearly announced was as to much the larger part traditional, and in form as archaic as many of the statutes. Successive prætors added very little, and in its written and published form there was little real distinction between the Edict and the statute law.

But the latter had been subjected to a more thorough examination and scientific discussion. Commentaries on the Edicts did indeed exist, but the Edict itself was haphazard in its arrangement and contained obsolete and contradictory provisions. The need for a restatement must have been long felt before the emperor Hadrian commissioned the head of the Sabinian school, Lucius Salvius Julianus (Julian), to revise it—doubtless during the latter's prætorship.

Julian was an African by birth, an active and successful administrator, a writer of originality and power. He was undoubtedly one of the great legal minds of the Western world. Besides the revision of the Edict, his great Digest, in ninety volumes, was an almost incredible achievement for the learned leisure of a busy life. As far as the prætorian Edict was concerned, he is supposed to have given form and arrangement to it, to have removed useless matter, rather than to have made extensive additions. Some innovations we know he made, but, even if he had not, the recasting of the form gave abundant opportunity for impressing upon it the special bent of his mind.

The Edict remained permanently as Julian framed it.<sup>31</sup> It was not contemplated that any further changes would be necessary. None in fact are known, but, of course, the progress of application brought about the ceaseless transformation and amplification which all supposedly fixed legal masses suffer, and we may be sure that the Edict as Julian knew it was notably different from the parts of it that were incorporated into the legislation of Justinian, even though scarcely a syllable had been changed.

If the prætorian *imperium* and that of other magistrates issued no new edicts, and therefore made no further additions to law by way of generally framed rules, the new *imperium* of the

<sup>31</sup> The most successful reconstruction of the *Edictum Perpetuum*, as framed by Julian, is the work of Otto Lenel, Leipzig, 1883 (2d Ed. 1907). A third edition is in preparation. It is this recension which appears in the *Fontes Iuris Romani*, of Bruns-Gradenwitz (7th Ed.) 1909 (*infra*, § 185).



*princeps* became increasingly important in this respect. Augustus and his successors issued edicts, just as other magistrates did, and these edicts had the effect of permanent announcements without formal renewal by every new emperor. He issued *mandates* to the provincial magistrates under his particular control—instructions that were to be the permanent guides of these officials. Again, as any *prætor* might, he issued direct commands where appeal for justice was made to him; these commands whether positive or negative were termed decrees—*decreta*. And above all he was in the habit of corresponding with his far-flung officialdom by way of epistles—generally in answer to questions put to him, *rescripta*. We have, wholly outside of legal literature, the complete correspondence of a distinguished Roman, Pliny the Younger, as governor of Bithynia, with the emperor Trajan.

Not only were the rescripts actually used as precedents, but they soon consciously assumed the tone of settling the practice for all future similar occasions. Further, these rescripts readily enough lent themselves to the functions of an appeal. But it was an appeal in the course of pending litigation rather than after a determination. A party doubtful of the issue, or fairly confident it would go against him before the magistrate, or *iudex*, presented a petition, *libellus*, to the emperor. The emperor might refuse to entertain it, might refer the petitioner to the *iudex*, or might decide in his favor. The decision was communicated in writing, and the petitioner made whatever use of it he pleased. If it was in his favor, it obviously concluded the case in fact, if not in form.

When petitions became frequent, a regular office was created for dealing with them, and a learned legal council passed upon them. Thus the decision, though in the emperor's name, was generally that of a highly competent Privy Council. The great lawyers of this period were members of this council, and had consequently a judicial as well as a professional experience. Up to the time of Hadrian, the council was casual and changing. After that it became something like a permanent organization.



All these different types of imperial determinations were popularly gathered under the general name of "constitutions," and in later times the term "constitution" replaced the more specific designation of *epistula*, *decretum*, *rescriptum*, and the like.

The principate of Hadrian has been frequently mentioned as a point of departure. During it the constitutional organization of the state noticeably changed. The emperor was consciously assimilated to the monarch as Julius Cæsar conceived him, for whom the great Hellenistic kingdoms served as models. The breakdown of the privileged position of Italians was indicated by the freer distribution of Roman citizenship to the provincials. The empire was obviously moving in the direction of a centralized state, which should embrace the whole Mediterranean.

In the field of private law, it was in Hadrian's reign that the Edict was made permanent, the Imperial Council organized as a definite part of the constitution, and the authority of professional opinion specifically declared.

It may be that the permanent registration of imperial constitutions also begins about this time. When official collections of such constitutions were made, several centuries later, the earliest that could be found was one of Hadrian. It is noticeable that the *senatus consultum* is found inadequate and clumsy as a legislative vehicle. Frequently the imperial address which gave rise to it is cited, instead of the decree itself. We hear of the *oratio Marci*, as well as of the *senatus consultum* which embodied it, and a little later only of the *oratio principis*, and not of the *senatus consultum* at all.

## THE EFFECT OF IMPERIAL EXPANSION ON LAW AND PROCEDURE

30. (a) The extraordinary jurisdiction of magistrates was much extended.
- (b) Roman citizenship was made general throughout the Empire in 212 A. D. This made Roman law paramount, but did not completely abrogate other systems.

Also in the time of Hadrian the formulary procedure was being gradually displaced by another system, the system of the *cognitio*.

The power of a magistrate to exercise his *imperium* at once, in order to enforce his legitimate orders, existed ever since there was an *imperium*. Generally he acted of his own motion, but often it must have been upon the application of some party. In two large classes of cases—those of restitution and interdict—this direct application of magisterial power had become so common that it was regularized, systematized, and became a part of the usual procedure. But these well-known and systematized groups did not exhaust the functions of magisterial jurisdiction. A certain number of cases—of a miscellaneous character—were equally dealt with by the magistrate without a *formula* and without *iudex*. Some of these needed expedition—as when a slave sought protection from abuse. Of the majority, however, this does not seem to be true. Even in the first period of the principate—Augustus to Hadrian—we may assume that the increasing number of imperial magistrates and submagistrates, whether they had *imperium* themselves or possessed it by delegation, consciously strove to make as much as possible of their functions. Matters which were obviously new in kind—the testamentary trusts (infra, § 167), the claims of the imperial treasury, the application for public alms, the questions involving guardianship—all these, among others, were determined by the prætors without a *iudex*, after investigation (*causa cognita*). Since they were

outside the course of the common procedure (*extra ordinem*), they have been called extraordinary, and the term will do as well as any other.

In one of the Hellenistic kingdoms which had become a part of the Roman empire, the organization had been fuller and more elaborate than in any other. This was Egypt. It is also the best known to us, thanks to the thousands of papyri which have been discovered there within the last hundred years.

Egypt from time immemorial had been administered by an intricate bureaucracy of officials, and it was taken as the consciously selected model for the imperial jurists in encouraging the growth of the extraordinary cognition.

In the year 212 the emperor Caracalla—properly, Marcus Aurelius Severus Antoninus—decreed that all, or very nearly all, the free inhabitants of the empire were thenceforth to possess Roman citizenship, in addition to whatever civic status they already enjoyed.<sup>32</sup> This imposed burdens, as well as conferred privileges, and it has been conjectured that the burdens were at least as much in the mind of the ruling powers as the privileges. The situation created by this decree—called the *Constitutio Antonina*—enormously facilitated the work of the bureaucracy and stimulated its growth. The *ius civile* of Rome was now, in a sense, the sole law of the Mediterranean.

But only in a sense. It was not quite the sole law, even in theory. The customs of local communities were no more abrogated than the local organizations were themselves dissolved. Custom was still given a large share in the creation of law, and it is short-

<sup>32</sup> What was supposed to be a fragmentary version of the text in Greek was found in a Giessen papyrus by P. Meyer, Pap. Giess. 40. Cf. Bry, *Études Girard*, p. 3 et seq. Extensive inferences were drawn from this text, based largely on the reading of a word. The reading, although generally accepted, was questioned by P. Jouguet, *Vie Municipale dans l'Égypte romaine*, p. 354. A new examination of the text has shown the reading to be impossible. E. Bickermann, *Das Edikt des Kaisers Caracalla in P. Giss. 40* (Berlin, 1926) p. 26. The constitution is known in substance. D. 1, 5, 17.

ly before this time that a great lawyer specifically placed custom on a par with statute as a source of law. Not only did local customs maintain themselves as far as they were necessary to interpret transactions, but many specifically legal rules continued to be enforced, which were unknown and even opposed to the Roman law.

Besides this, the common Greek culture and speech of the Eastern Mediterranean had developed a common law, of which the origins are to be sought in widely differing places, in the Greek city states, as well as in the ancient monarchies of Mesopotamia and Egypt. But, however varied in origin, it had in the centuries of its development suffered considerable modification and approximated a single large system. The East Mediterranean common law had to struggle against the Roman law, enforced as the latter was by an army of officials, and it not merely maintained itself in a half-submerged condition, but it added distinct elements to the Roman system, some of which, like the *hypothec* or *emphyteusis*, show their Greek origin in their name, and others of which were more completely absorbed. The importance of the written document—the *chirographum*—is one of the Eastern ideas that took a firm hold of men's minds. And particularly we must trace to this source the rise of fixed occupational classes, from which escape was difficult, so that the society of the third and following centuries shows astounding similarities to the later feudal system of Europe. The process which has been called orientalization of the Roman law began in this period, and was far advanced when the absolute monarchy was established.

### THE GREAT JURISTS—THE CLASSICAL PERIOD IN ROMAN LAW

31. (1) Gaius, known only by his extant manual, the *Institutes*.
- (2) Cervidius Scævola, author of a Digest.
- (3) Papinian, brilliant and profoundly influential.

- (4) Paul, ingenious and subtle.
- (5) Ulpian, eminent as a critical systematizer.
- (6) Modestinus, learned commentator.

Characteristic of the period after Hadrian is the predominance of great legal figures.<sup>33</sup> One of these has already been mentioned, Gaius, about whose personality a violent historic controversy has raged ever since the manuscript of his *Institutes* was discovered a hundred years ago. Even his name is uncertain. He lived and died in comparative obscurity, and it was not till many years after his death that his surviving works became treated with a profound respect, chiefly perhaps because of the popularity of his elementary treatise, the *Institutes*. It is characteristic that, although he died after 178 A. D., he still wrote a commentary on the Twelve Tables and on the treatise of Quintus Mucius (*supra*, § 24). His chief characteristic was smoothness and clearness of exposition, no small recommendation in legal literature, then as now.

A contemporary of Gaius, Quintus Cervidius Scævola, was a member of Marcus Aurelius' council, and an influential and active writer. His *Digest*, in forty books, indicates the popularity of this type of treatise (*supra*, § 27). His decisions are remarkably terse, and the other fragments of his work give the general impression of a severely practical mind.

His pupil, Æmilius Papinianus, the friend of the emperor

<sup>33</sup> Many of the names mentioned in this section have been made the subjects of special studies. Buhl, *Salvius Julianus*; Costa, *E, Papiniano*. Their characteristics of personality and style are briefly discussed in the various histories of the sources: Krüger, *P, Geschichte der Quellen und Litteratur des Römischen Rechts* (2d Ed. 1912); the briefer book on the same subject by Theodor Kipp (3d Ed. 1909); Costa, *E, Storia delle fonti del diritto romano* (1909). There are brief biographies of Gaius, Papinian, and Ulpian, in *Great Jurists of the World*, Continental Legal History Series, vol. II, Boston, 1914. Gaius has a literature of his own. F. Kniep, *Der Rechtsgelehrte Gaius* (1910), and Ph. Meylan, *Le Jurisconsulte Gaius* (Lecture at Lausanne, 1923).



Septimius Severus (*supra*, § 5), and perhaps, like him, an African by birth, was regarded in antiquity as the greatest of Roman lawyers, a judgment that modern investigators are inclined to confirm. He held the highest official positions, culminating in the command of the prætorian guard—a rank equivalent to that of prime minister. He was executed by the son of Severus, Caracalla, because he declined to approve the latter's murder of his own brother, the emperor Geta. He wrote no general treatises, and his works were, it seems, collections of decisions and discussions of special topics; but in keenness, in breadth of view, and in finesse they were models of their kind. His authority settled the law for centuries on many controverted questions.

Contemporary with Papinian, and a fellow pupil of his, was Julius Paulus. He was a much more prolific writer, and a great commentator of the works of earlier jurists, as well as of the Edict and a number of laws. In this type of writing, his characteristic subtlety and sharpness were specially exhibited. It is evident that he enjoyed the play of logical definition and differentiation for its own sake, which, again, is a trait not unfamiliar in his profession.

Younger than both Paul and Papinian was Domitius Ulpianus, a Tyrian—a term that at this time suggests Syrian rather than Phœnician origin. Under the Syrian, Alexander Severus (222–235 A. D.), he was first Master of Appeals and finally Prefect of the Prætorians. He is much the most industrious writer of all the Roman jurists. Fully a third of Justinian's Digest (*infra*, § 34) consists of quotations from his voluminous works, of which the most important was his great commentary on the Edict, and an almost equally extensive commentary on Sabinus (*supra*, § 27). There were besides many smaller treatises, a large number dealing with public law. Ulpian was more than a portentously learned man. He subjects received opinions to a searching and successful criticism. His reasoning is notably acute, and his treatment large and philosophical, even if his mind cannot be called original.



His pupil, Herennius Modestinus, closes the series of the great classical jurists, although there are later writers excepted for the *Corpus Iuris* of Justinian. The writings of Modestinus are largely special treatises, as well as collections of cases and decisions. It is important to note that some of his books are in Greek.

### THE COGNITION PROCEDURE

32. The bureaucratic organization required greater immediate control by officials. The cognition procedure, formerly used only in extraordinary cases, becomes general. Pleadings are written with stated terms between them; evidential oaths are common; the *iudex* becomes a subordinate official; an elaborate system of appeals is constructed. In spite of the complexity of the judicial organization, law is simplified in theory by being identified with general morality. The three maxims of Ulpian, repeated in the Institutes of Justinian, are moral apothegms rather than rules of law.

The absolute monarchy of Diocletian and his successors was marked first of all by the disappearance of any indirectness in the way in which the monarchical *imperium* creates law. The emperors still issue rescripts, edicts, "constitutions" of various sorts, but these now form admittedly the only legislative process, and are actually called *leges*, statutes, just as the ancient statutes of the *populus Romanus Quiritium* were.

The increasing complexity of the bureaucracy keeps pace with the increasing rigidity of the guilds and the economic classes generally, into which most men are born, and from which, except by the church or the army, they can scarcely escape. The members are without intentional metaphor called *servi functionum*,<sup>34</sup> slaves of the duties they are to perform. With the ex-

<sup>34</sup> C. Th. 16, 4.

tension of the Roman citizenship there has also been a gradual amelioration of the status of slaves—an amelioration that had begun with Augustus and been widely extended under the Antonine Cæsars, until, under the Christian emperors, fairly complete protection was given to the lives and bodies of the slave population.

The idea of *iūs* as something which a magistrate will assist a Roman to obtain is still the dominant one, but the matter of setting the *imperium* in motion has completely changed. The extraordinary *cognitio* has wholly superseded the *formula*. The defendant is summoned into *iūs*, by an official subpœna, *litis denuntiatio*. The plaintiff's complaint—to be filed within four months—was framed in writing, the *libellus conventionis*. The defendant was given ten—later twenty—days to file a similar written answer, *libellus contradictionis*. In the meantime, a bond was given for the defendant's appearance. Otherwise judgment was taken by default, but the default might be opened and the issues tried all over later on.<sup>35</sup>

On the day set, there was a *cognitio*. Both parties took oaths of good faith, and proceeded to establish their case by arguments pro and contra. But the trial is apt to result in a formal challenge to take an oath to the matter. This so-called obligatory oath—*iusiurandum necessarium*—permitted with considerable restriction in the old procedure, was now quite general, and soon came to be a familiar and highly important element of a trial, as it remained throughout medieval and modern times in the countries of the Roman law.<sup>36</sup>

The *iudex*, too, is an altogether different kind of person. He is no longer a Roman citizen of the upper classes, directed by a magistratè to find the justice of the controversy, while the

<sup>35</sup> Wenger, Leopold, *Institutionen des römischen Zivilprozessrechts* (1925) pp. 246-329.

<sup>36</sup> The term *iusiurandum necessarium* in the sources is found in the title of D. 12, 2, but in the texts the word *necessarium* does not seem to occur. The phrase *deferre iusiurandum* is the usual one to indicate the challenge to an oath.

magistrate undertakes himself to carry the finding into effect. The *iudex* of the *cognitio* is an official selected for each case, it is true, but essentially a subordinate magistrate, indistinguishable from the clerks, inspectors, recorders, and the best of his bureaucratic colleagues.

And from this new type of *iudex* an appeal lies as a matter of course to another magistrate, and from him to a still higher magistrate, until it reached the prætorian prefect; but, in most cases, an appeal could not go beyond two instances. It could not go beyond the prefect, except on an application to the emperor himself—just as in our proceedings by *certiorari*. Ordinarily the emperor took the advice of his council, now called a consistory, and presided over by the *quæstor sacri palatii*, the Steward of the Imperial Household.

Execution under the cognition procedure was simpler than under the *formula*. There was an *actio iudicati* (supra, § 21). Execution against the person was forbidden by law in a constitution of Theodosius (Cod. Theod. 9, 11, 1), of 388 A. D., but we know from the papyri and from the contemporary literature that it was frequently practiced in the Eastern provinces, where it had existed from time immemorial. In most cases, the local customary law permitted it, and the imperial legislation was powerless to change the practice (supra, § 30).

Property execution was carried out in a somewhat different way. Judgment for a particular *res*—i. e. in vindications (infra, § 47)—could be followed by the actual seizure of the *res* and its transference to the plaintiff. Further, the execution could be directed in other instances against specific pieces of property to compel the defendant to give the relief demanded. And finally the general execution against all the property of a debtor, the *missio in bona*, (supra, § 21), was followed, not by the older type of sale, viz. the sale of all the property in block to a single purchaser, who paid a dividend on the debt, but by a *distractio bonorum*, a sale of all pieces of property separately for the benefit of the creditors.

This procedure, which reeks of dust and parchment, and has dominated most modern systems since, was admirably suited for the type of state that Diocletian created.

But, although in practice a good deal of the formality and routine of the ancient ritualistic procedure was recreated, the ideal was set higher than ever before, and it was proudly announced that nothing was *ius* except the *bonum et æquum*. Three famous maxims, originally phrased by Ulpian, were said to be the foundation of the law. They were *honeste vivere*, *alterum non lædere*, *suum cuique tribuere*, and may be translated "to live honorably," "not to injure another," and "to grant each man his due."<sup>37</sup>

These maxims are, of course, not legal principles at all, but merely pious hopes that the application of the totality of legal rules will result in no one being injured, each one receiving what belongs to him, and in all men living honorably. All legal systems express such hopes, and no society would admit that its organization is likely to result in anything else. If we attempted to apply these maxims seriously as guides of legal conclusions, we should find that they are contradictory, or that the terms used have really no meaning at all.

They represent the tone which the official law takes, and which is carried to an extreme of extravagant pretensions and turgid rhetoric in the rapidly multiplying imperial constitutions.

Yet the actual application of law was made by men who preserved the ancient tradition, and who were trained in well-organized schools in the thorough study of the words of the great jurists. The imperial chancellery might issue its announcements in the inflated phraseology that such institutions affect, but the *jurisconsulti* who practiced their craft, much as it had been done in Rome since the days of Sextus Ælius, were acute and reasonable men, who made the usual traditional effort to reconcile the claims of abstract justice with the articulated and systematic body of accepted rules.

<sup>37</sup> I. 1, 1, 3; D. 1, 1, 1, 2.

The *ius respondendi* (supra, § 27) was probably no longer granted, but of the continued existence of *jurisconsulti* there is, of course, ample evidence, and, while the *iudex* could not be compelled to defer to a cited opinion, he must have used such arguments as it contained, even more fully than modern appellate courts use the briefs of counsel.

### THE FIRST CODIFICATIONS

33. Constitutions—practically equivalent to statutes now—are first collected.

(a) Codex Gregorianus—constitutions from Hadrian to Diocletian. Only a few fragments preserved. An unofficial collection.

(b) Codex Hermogenianus—constitutions of Diocletian and others. Only a few fragments preserved. An unofficial collection.

(c) Codex Theodosianus—official collection of the emperor Theodosius II in 438 A. D. A large part preserved.

(d) The Law of Citations of Valentinian III (426 A. D.). Only five jurists, Gaius, Papinian, Paul, Ulpian, and Modestinus, might be cited. Certain rules of citation were established. In effect it was a clumsy attempt at codifying the whole law.

We must note, however, that the first recourse in determining their decisions is to the imperial constitutions. As has been said (supra, § 29), these were likely to be as much the work of some eminent lawyer as the writings he published, but in form they issue from the lips of majesty itself. The need for some easy mode of consulting them was first to be felt.

About the year 295 A. D. an otherwise unknown Gregorius published a collection of constitutions of the emperors from Hadrian to his own day in more than nineteen books. The collection was quite unofficial, and was intended for practical use. The term for the collection was *corpus*, "body"; but the form of



its publication—that of a *codex* like the modern book, rather than the ancient roll—popularized the name Code for this kind of collection and introduced that term into the law.

At about the same time a certain Hermogenianus published a Code of much more recent constitutions, most of them of Diocletian himself, whose activity in this respect was enormous. The Hermogenian Code was re-edited several times, and newer constitutions added, but it remained an unofficial collection.<sup>38</sup>

Both the Hermogenian and Gregorian Codes are known to us only from a few citations, but we have in a much larger part of the officially collected Code of the emperor Theodosius II, published in 438 A. D. The method of the collection was that which has since become usual. An official commission was appointed, with ample powers of revision and omission. This commission reported after some three years, and the result of their labors was enacted into a great statute, to supersede all the constitutions from Constantine on, which left the Gregorian and Hermogenian Codes practically intact.<sup>39</sup>

However, another step in the direction of a general codification had preceded the Theodosian Code. In the year 426 A. D. the emperor Valentinian III by a special constitution enacted a Law of Citations, the purpose of which has been largely misunderstood.<sup>40</sup> It was not an effort of legal pedants to make their work at once simpler and more mechanical. It was an attempt—clumsy, to be sure, but not altogether without a rational justification—to set a *corpus* of judicial opinion by the side of the several statute *corpora*, already existing or being prepared.

The plan was the following: Authoritative interpretation was to be allowed only to the five great writers, Gaius, Papinian, Paul, Ulpian, and Modestinus. It is evident that the importance

<sup>38</sup> The fragments of both the Gregorian and Hermogenian Codes are collected in volume III of Krueger-Mommsen-Studemund, *Collectio librorum iuris anteiustiniani*, and in part II of Riccobono's *Fontes*.

<sup>39</sup> The latest and best edition is by Mommsen-Meyer (2 vols. 1905).

<sup>40</sup> C. Th. 1, 4, 3. Cf. the previous constitution of Constantine, C. Th. 1, 4, 1.

of Gaius is relatively recent. It is specially provided, however, that the text of Papinian is to be used directly, without the annotations of Paul and Ulpian. Secondly, Sabinus, Scævola, Julian, and Marcellus (about 150 A. D.) are to rank as authorities as far as their works are quoted in the first five. Otherwise they can be cited only if the text is specifically proved to be authentically theirs.

The weight of authority, if there is a difference of opinion, was determined by the majority. If the number was equal, Papinian's opinion prevailed. If Papinian was silent on the question, the judge, in the case of an equal division of authority, might use his own discretion in preferring one recorded decision to another.

It is by no means certain that this "Law of Citations" was either difficult to apply or very unsatisfactory. There were few matters, indeed, which were not found discussed in one or another of these writers, and in Ulpian's works there was an especial mass of citations of earlier jurists.

### THE CODIFICATION OF JUSTINIAN

34. A commission was appointed to prepare a Code (i. e., revise the statutory law) in 528, of which commission Tribonian was a member. The commission made its report in 529. A new commission, headed by Tribonian, was appointed in 530 to prepare a *Digest* of juristic writings, which reduced extant writings to one-twentieth.

The *Digest* took great care to assign authority for all its statements, as indicated in the illustration given.

A new hand-book, the *Institutes*, was published in 533. The *Digest* was published in 533. A new revision of the Code was published in 534. The *Novels*—(i. e., new constitutions) were published in 535–555. The whole was later called *Corpus Iuris Civilis*.

The Corpus made a number of important reforms in the law of persons, property, and succession.

The revival of Roman power and authority under Justinian (supra, § 6) was accompanied with a renewed interest in legal reform. Two great law schools, one at Berytus (Beirut),<sup>41</sup> and one at Constantinople, had worthily maintained the standards of legal scholarship, and these institutions made the projected reform possible. On February 13, 528, Justinian established a commission of ten to amalgamate the existing three Codes, to abrogate obsolete constitutions, and to add in a revised form subsequent ones. The members of the commission were the present and former heads of the Consistory (supra, §§ 29, 32), two former Chief Justices, prefects of the prætorians, the Master of Appeals, Theophilus, also professor of law at Constantinople, and two distinguished barristers of the highest court. Another member of the commission was Tribonian, then holding no official position, but already recognized as one of the great lawyers of the empire.

The constitution which established the commission was known by its opening words "*Hæc quæ necessario*"—a practice of naming laws that became quite common in medieval times, as in the case of the English statute *Quia emptores*.

It is plain that the only purpose of the emperor was the preparation of a Code, in the sense of a body of statutes—a task corresponding somewhat to the periodical Revised Statutes of most of our jurisdictions. But the spirit of revision was not to stop there. The Code was completed within a year and published by the constitution *Summa rei publicæ*. In it the Law of Citations was re-enacted.<sup>42</sup> The Law of Citations, while serviceable, was

<sup>41</sup> The history of the school at Berytus is being made the subject of a special monograph by M. Collinet. *Histoire de l'école de droit de Beyrouth*, 1925 (*Études hist. sur le droit de Justinien*, vol. 2).

<sup>42</sup> This highly significant fact was not known till a recently discovered papyrus was published in *Oxyrhynchus Papyri*, XV, No. 1814. Cf. 17 Ill. Law Rev. pp. 247, 248.

from the point of view of scientific arrangement and thoroughness obviously inadequate, and this inadequacy must have been particularly noticed in the schools of Berytus and Constantinople.

Twenty months after the Code was published, a new commission was announced in the constitution *Deo Auctore* (December 15, 530), of which the purpose was to do with thoroughness what the Law of Citations had attempted rudely. Of this commission Tribonian was the president, now the Steward of the Imperial Household and head of the Consistory. With him were some of the members of the Code Commission, including the Master of Appeals, Constantine. Besides, there were two professors of Constantinople, two of Berytus, and eleven barristers of the prætorian court—seventeen in all.

The commission was given wide powers. How far they used them is a controverted question. At any rate, they had before them an enormous legal literature in something less than two thousand books. These they reduced to one-twentieth, counting by lines of manuscript. The result was known as *Digest*, or *Pandects*. The earliest writer excerpted was Quintus Mucius (supra, § 24); the latest, Arcadius Charisius, who seems to have lived after Diocletian.

The method was to follow the divisions and subdivisions of the Commentary on the Edict, and the fifty *books* were arranged in seven groups. Each book has a special topic, divided by *titles* into subtopics, and each title has *fragments*; i. e., quotations from one of the books, divided if necessary into *sections*. Four numbers are thus needed to identify a citation of the Digest: Book, title, fragment, and section, or three, if the fragment is short.

Each fragment is cited with the name of the writer and the book from which it was taken—a task which Justinian wished performed with reverential piety.

An example will illustrate the method—taken from the ninth book of the Digest, title 2, “On the Aquilian Law”: D. 9, 2, 34–36.

"Fragment 34. Marcellus: Digest, Book Twenty-One. A bequest is made of the slave Stichus to Titius and Seius. While Seius is making up his mind, and after Titius has brought an action to get possession of the slave, the latter is killed. Then Seius rejects the legacy. Under these circumstances Titius may sue as though he were the sole legatee ———"

"Fragment 35. Ulpian: On the Edict, Book Eighteen. — because he is held to have complete title by accretion and the title relates back; ———"

"Fragment 36. Marcellus: Digest, Book Twenty-One. —for just as the heir may sue when a legacy has been rejected as though no legacy had been made, so the joint legatee may in this case sue as though he had been sole legatee."

In this way a brief comment of Ulpian, forming not even a complete sentence, is thrust into a longer citation from Marcellus, and meticulous care is taken that Ulpian shall have the credit of it. There are many such instances in the Digest, and this fact must affect our judgment on the question of "interpolations" (*infra*, § 35).

The Digest took three years to prepare. It was enacted as law by the Constitution *Tanta* (December 15, 533), and a corresponding constitution in Greek, while the constitution *Om-nem rei publicæ* made it the basis for higher instruction in the law schools.

An incidental task of Tribonian's commission was to prepare an elementary text-book. A subcommission, consisting of Tribonian himself, Dorotheus of Berytus, and Theophilus of Constantinople, prepared the manual we still call the Institutes of Justinian, in four books, partly based on Gaius, but with large additions and considerable changes. It was published November 21, 533, by the constitution *Imperatoriam maiestatem*.

The Code of more than four years earlier was already antiquated. Four members of Tribonian's commission were instructed to make the necessary revision, and the second edition of the Code (*repetitæ prælectionis*) was published November 16, 534, by the constitution *Cordi*.



"This Code" says Justinian, in the constitution *Summa rei publicæ*, addressing his Chief Justice, the prætorian prefect Mena, "as we wish in our providential care to impress on Your Excellency's mind, is to be valid for ever." He is not so sure in the constitution *Cordi* that there will be no changes, and, indeed, new constitutions, supplementary and emendatory, were promptly published. Before the end of Justinian's reign about 159 new ones had been issued, known as the *Novels*. No official collection was ever made of them, but, in the Middle Ages, the Novels were added to the other parts of the Justinian legislation, and the whole called by the famous name of *Corpus Iuris Civilis*.

The Corpus was not a mere compilation, nor yet a mere revision, of existing law, in which archaisms were abolished and contradictions eliminated. In the Code and the Novels are contained a great deal of new reformatory legislation in almost every branch of the law. It is convenient to attribute this to Justinian himself, although it is more than likely that he gave at best the impulse to a movement which took place in his time. In the law of family relations Justinian completed the work begun with Diocletian and continued by the Christian emperors. The *dos* (dowry) was regulated; the power of fathers of their children and masters over their slaves curtailed; divorce was limited; the effect of emancipation of children much reduced.

In property law, all traces of the difference between Quiritary and equitable ownership (*infra*, § 123) were abolished and the two existing forms of prescriptive acquisition were amalgamated.

The largest changes were made in the law of succession, both intestate and testamentary. The claims of blood kinship were freed from artificial restrictions, and that of the half blood recognized. For a detailed account we must refer to a later discussion of the topic (*infra*, §§ 160-168, 173-175).

Apparently in the law of obligation, contract, tort, and quasi contract fewer changes were made than in any other branch.

## INTERPOLATIONS

35. Besides the conscious reforms in the Code and Novels it is assumed that the Digest Commission freely revised the writings cited in the Digest. Their additions are called interpolations.

Some interpolations are certain, as illustrated in a comparison between Gaius, as found in a separate *ius*, and as quoted in the Digest.

Other interpolations are dubious. The tests usually applied are not convincing.

The changes so far mentioned are the subject of specific legislation in the constitutions issued by Justinian. But a vastly more complicated and extensive series of changes has been ascribed to the Digest Commission, acting on the emperor's behalf and by his authority. The compilers of the Code obviously could scarcely do otherwise than omit those constitutions, or parts of them, which had been intentionally repealed, and must have rephrased the older ones, which were neither completely repealed nor wholly in force.

Tribonian and his associates had a similar power in the case of the fragments they collected for the Digest. It is quite widely supposed at the present time that they made large use of it; that they added large sections in very many citations, recast sentences freely, and so completely rewrote much of what they quoted that the original form of Labeo's, Nerva's, or Ulpian's ideas can scarcely be discovered. The changes they made, especially by way of additions, are commonly called "interpolations." That interpolations existed—*emblemata Triboniani*—scholars had long known, and at one time it was customary to ascribe them to a deliberately fraudulent design of Tribonian. In recent times, however, Tribonian has been freed of evil intent, but credited with vastly greater industry. The study of these interpolations has, particularly in Germany and Italy, been made into something like a cult, and a tech-

nique elaborated for the detection of the portions due to the compilers.<sup>43</sup>

This technique, which rests to a large extent on stylistic criteria, has been confidently applied. Its success is more than doubtful. It is very likely that the extreme point of view which uses the occurrence of certain locutions and words as proofs of indubitable interpolation will be abandoned. It may even be that a fortunate discovery among the papyri will give us a means of unmistakably testing the validity of the technique. For the present it is certainly the safest course to assume *prima facie* that every citation in the Digest is substantially as it was written by the jurist from whom it is quoted.

Perhaps a typical example will suffice. We happen to have an independent manuscript of the Institutes of Gaius. Even that has not escaped the hypothesis that it has been largely revised or interpolated, but this theory will, it is hoped, meet with little acceptance. Gaius is also frequently quoted in the Digest and a number of the quotations are from the Institutes. If we compare our Gaius with the selections in the Digest, the changes are seen to be of the minutest kind, and are, in most cases, such variants as might exist in several manuscripts of the same author.

But there are several cases which go beyond this. In Gaius, I, §§ 98, 99, we read:

"Adoption takes place in two ways, either by authority of the *people* or by the *imperium* of a magistrate [such as the praetor]. By authority of the *people* we adopt those who are *sui iuris*. This kind of adoption is called arrogation, because both he who is adopting is asked (*rogatur*) whether he wish-

<sup>43</sup> Cf., on the whole subject, the judicious remarks of W. W. Buckland, *Interpolations in the Digest*, 33 Yale Law J. 343 et seq. The exaggerations of some of the more recent attempts in this direction are reprehended by one of the greatest of living Romanists, Otto Lenel (*Zeitschrift der Savigny Stiftung*, vol. 45 [1925] 7), who himself has made large use of interpolations in his reconstruction of the Edict and in his *Palingenesia*.

es him, whom he is about to adopt, to be his son for all legal purposes; and he who is adopted is asked whether he is willing that this be so [and the people are asked whether they bid this be so].”

This appears in the Digest, I, 7, 2, with certain changes.

The exact words in every way are found in that precise order; except for the fact that the phrases in brackets are omitted and in place of the italicized word “people” appears the word “emperor.” In addition, the word “*Generalis*” (In general) is inserted at the very beginning.

From the comparison of these two passages we can see the kind of interpolation which the compilers certainly made, whenever they were so minded. In the time of Antoninus (*supra*, § 5), when Gaius wrote, it was still the theory that the emperor was a magistrate who owed his authority to the sovereign people, and all the ancient functions of the sovereign were still in form performed by the people through their delegates. In Justinian’s time, this theory had in the main been long discarded, and the *princeps* was the sovereign master of the people. The change is indicated in the citation.

Again, the praetor in 160 A. D. was still an active and ubiquitous magistrate. In 533, he was a mere honorary official, and real magistrates with hundreds of titles swarmed in every province and town. “Praetor” would therefore, in the Digest, be omitted as a characteristic type of a magistrate with *imperium*.

The word “*generalis*,” finally, is a mere word of connection, and was evidently used to begin a new topic. In inserting a word like this, the compilers would scarcely think that they were taking liberties with the text of Gaius.

It is quite possible that this is only one kind of interpolation, and that others were made of a much more far-reaching sort; but we can only treat the first kind as demonstrated. Consequently, unless a supposedly interpolated passage is plainly the result of an attempt to accommodate the known situation of the earlier time to the known situation of Justinian, the hypothesis of interpolation must be received with great caution.

## ROMAN LAW AFTER JUSTINIAN

36. (a) Roman law continued to be the law of the Empire, now Greek in speech, till 1453 A. D. Commentaries, translations, and glosses in Greek were widely used. A Greek revision, the *Basilica*, was published about 900 A. D.
- (b) Roman law continued to be the law of the Roman subjects of German kings in the West.
- (c) The church law was built up on Roman models.
- (d) A new impetus was given to Roman law in 1100 A. D. in Italy, and it gradually superseded most local laws of Western Europe by 1500 A. D., except in England.
- (e) The modern Codes of Europe (French Code, 1804; German Code, 1900) are founded on the Roman law.
- (f) An active assimilation is now going on between the Roman and common law systems.

A word must be said of the history of the Roman law after Justinian. The empire lasted continuously in the East until 1453 A. D. (supra, § 6). Most of the Novels were issued in Greek, but an official Latin version was made of a great many, and an unofficial Latin collection, later called the *Authenticum*, was prepared in Justinian's lifetime, as well as a Latin epitomé, the *Epitome Iuliani*. Again, a Greek paraphrase of the Institutes was written, perhaps by Theophilus himself, a member of both the Digest and Institutes Commissions (supra, § 34).

For practical purposes, also, Greek translations and commentaries of the Code and Digest were made almost at once, even though Latin remained the official language of the courts for several centuries—a circumstance which bears a striking analogy to the survival of French as the language of the English law courts, centuries after it had ceased to be the language



of ordinary life. But Greek, as in the corresponding case of English, ultimately superseded Latin completely, even as the technical expression of a law still called the Roman law. About the year 900 A. D. the emperor Leo published a Greek revision of the Corpus, which was called the Basilica, because it had been begun by Leo's predecessor, Basil, the Macedonian. It takes all the four parts of the Corpus and fuses them into a single collection of sixty books, in which every provision is put in its proper place, whether it comes from the Digest, Code, Institutes, or Novels. In doing so much was omitted, and a good deal adapted to the changed situation of the Empire. Further, *scholia*—that is, marginal glosses derived from the legal literature after Justinian—were added to the Basilica within the next century and became almost an integral part of the Code.

In this way the continuity of the Roman law was maintained in an unbroken line from the first *lex* issued by the assembled *populus Romanus* in the Campus Martius in Rome, an event which must have been many centuries before 500 B. C., and from the first formal vindication before a Roman magistrate, which must have taken place far earlier, to the actual capture of New Rome, Constantinople, in 1453 A. D. The juristic literature proper runs from Sextus Ælius' *Tripartita* in 200 B. C. to the *Hexabiblos* of Constantine Harmenopoulos in 1345 A. D.

Between the year 400 A. D. and the time of Justinian, Western Europe had gradually slipped out of the control of the imperial officials and into the power of various Germanic chiefs (supra, § 6). The Roman population continued to be governed by their own laws, and the barbarian conquerors by their tribal customs, which were, later, drawn up in a rudely systematic form. The idea of the "personality" of law was revived—not a new nor yet a strange idea to the Mediterranean world, but obscured for many centuries after the *constitutio Antonina* (supra, 30) by the almost universal sway of the Roman imperial power. Within every community there

were groups of men who could claim as their right the application toward them of one of several existing bodies of legal rules.

For the Romans in these Western communities, the old forms, the old legal rules, the old statutes, were still in force; and magistrates, responsible to Germanic chiefs, to be sure, administered it much as they had always done, making such modifications as profound changes in society rendered necessary. Two *corpora* were established by German kings for their Roman subjects shortly before the time of Justinian. One was the *lex Romana* of the Visigothic king, Alaric II, in Gaul (Gascony), promulgated in 506 A. D., often called the Breviary of Alaric. It contains selections from the Theodosian and the earlier Codes, a somewhat modified and abridged form of a work of Paul, the Sentences in five books, citations of which also appear in the Digest, and a very much modified form of the first three books of Gaius' Institutes.

Again in 517, King Sigismund, of the Burgundians, announced a statute for his Roman subjects called *Lex Romana Burgundionum* (also *liber Papieni*). It has forty-seven titles and contains a great many provisions taken from the Code of Alaric and from other Roman sources. It never had the importance or the popularity of the Breviary, and apparently soon became obsolete.

As far as the later history of the Roman law in Western Europe is concerned, only the briefest sketch can be given here. The authority of the Roman emperors, after the time of Justinian, survived only on the western and southern coast of Italy, and disappeared even here after the ninth century. In the rest of Western Europe new societies were gradually forming of a different constitution and different political organization from those of the ancient world. Thousands of local customs of diverse origin grew up in a territory vastly transcending that which the Roman emperor had ever controlled. The great institution of the Western Church, of which the supreme head was the Pope, the Bishop of Rome, developed

a law of its own, partly derived from Roman sources and certainly organized on Roman models.

The Corpus of Justinian was known in the church and utilized for various purposes. Besides, in Italy, a systematic study and use of the Corpus in the lay community had never died out. This was enormously stimulated about the year 1100 A. D., apparently as an incident of the political contest between the popes and the German emperors, since the latter claimed to be the successors of Augustus, in conscious opposition to the emperors at Constantinople.

From this time on the spread of the Roman law as it was established in Justinian's Corpus was astoundingly rapid. It quickly superseded most of the local customs of Italy and southern France. It found a growing favor in Spain, and in the innumerable states of Germany. In Spain it served as the model in form, just as it furnished the bulk of the contents, for the Great Code of Castile, the *Siete Partidas* of Alfonso the Wise, of about 1270 A. D. In Germany it was formally received about the fifteenth century and soon became practically dominant. In northern France it supplemented the customs, which meant that, for the law of obligations and for a large part of the law of property and testamentary succession, it was the sole law. Few customary codes professed to regulate anything except a small number of topics in family law and in the law of property and succession. Again, in Scotland, as well as in the northern states of Europe, such as the Netherlands, it was adopted consciously as the general and supreme law, which was *prima facie* to be applied, except so far as expressly derogated.

Only in England did the Roman law encounter a resistance to which it ultimately succumbed, so that its influence there is difficult to trace, although in not a few instances it is unmistakable, and in many more it may reasonably be suspected.

It must be stated, however, that the law of the Corpus of Justinian was almost nowhere applied in an unmodified form. Not only did it suffer the inevitable effects of interpretation

in the hands of generation after generation of a new type of *jurisconsulti*, the Glossators, the Post-Glossators, etc., but it was accepted only with obvious supplements, derived principally from the Canon Law in regard to obligations, and from the Germanic customs in regard to property rights. Further a body of west Mediterranean maritime law, developed particularly in the trade centers of Italy, southern France, and Spain, grew into the law merchant, which in one form or another became a part of the general system.

At the end of the eighteenth century a movement, which had begun long before, resulted in the first great Codes of modern Europe, the Prussian Code of Frederick the Great, and the French Civil Code, often called the Code Napoléon, published in 1804. Except for expression and concision, the break between these Codes and the Justinian system is more apparent than real. This may be said even of the more recent restatements of European law, the Austrian Code, the German Civil Code of 1900, the Swiss Code of 1907 (Code of Obligations, 1911), and the newer South American Codes.

The French and the German Codes have served as the model for a great many other legislations, and through them legal ideas of Roman origin are freely applied in Japan, in Turkey, and in Egypt, as well as in the territories settled by Europeans. The most obvious movement in law at the present time is the gradual assimilation which is taking place between the modified Roman law of most modern countries and the only system that can pretend to rival it, the common law of England, the United States, Canada, and Australia.

## AN EXAMPLE OF CONTINUITY

37. A rule of bailment was in existence, as early as 150 B. C., at Rome, as indicated in fragments of Brutus, Mucius, Labeo, Gaius, and Ulpian.

The same rule in almost identical words is applied to-day, as in a New Jersey case of 1910 A. D.

The connection is indicated by following the citations of the latter case and noting that they lead directly to the Roman sources mentioned.

Since a concrete example is better in most instances than an abstract statement, the following illustration will make clearer than anything else the unbroken line of West European law:

Marcus Junius Brutus, the great-great-grandfather of the famous Brutus, seems to have referred, some time about the year 150 B. C., to the rule that a man "who drove a borrowed beast to a different place from that where he had agreed to use it, and likewise one who drove it further than the point he had borrowed it for, was guilty of theft." Theft, at this time, was a civil action against the tort-feasor on the part of the owner. It is to be noted that in Brutus' time this was already an established rule of long standing.<sup>44</sup>

The same decision is quoted from Quintus Mucius (100 B. C.), and in this case we have his exact words: "If a thing is given to any one for safe-keeping and he uses it, or if he has got it for use and he uses it otherwise than for the purpose for which he got it, he renders himself liable to an action of conversion."<sup>45</sup>

Both these passages are quoted from Labeo, who wrote about 1 B. C. The rule is again announced by Pomponius<sup>46</sup>

<sup>44</sup> Aulus Gellius, *Noctes Atticæ*, 6, 15, 1.

<sup>45</sup> Aulus Gellius, *Noctes Atticæ*, 6, 15, 2.

<sup>46</sup> Pomponius, D. 13, 6, 23.



and by Gaius (150 A. D.),<sup>47</sup> and is illustrated by the example of a horse driven beyond the place where the borrower had agreed to drive it. Again, Ulpian and Paul (225 A. D.) repeat the rule in a general form.<sup>48</sup> Finally, in the Institutes of Justinian,<sup>49</sup> the passages from Gaius are incorporated practically without change, as also in the Digest.

If we compare this series of decisions with the case of *Raynor v. Sheffler*, decided in New Jersey in 1910 and reported in 79 N. J. Law, 340, 75 A. 748, we find the facts are the following: "Sheffler borrowed the mare to go to Hackensack. \* \* \* In fact, he drove to Hackensack, a distance of four miles, and then, instead of returning by the direct route, he drove a very considerable further distance." The animal was injured by an unavoidable accident. The court below found that the borrower was not responsible. In reversing this decision, the Supreme Court announces "the rule of law that, if the thing borrowed is used \* \* \* in a different way or for a longer time than was agreed by the parties, the borrower is guilty of conversion." In support of the rule the court quotes Story on Bailments, § 232. Story, in turn (1832), quotes two French jurists, Pothier (18th century) and Domat (17th century), as well as the Digest, 13, 6, 18, pr., which is a citation of Gaius. But, above all, Story quotes *Coggs v. Bernard*, 2 Ld. Raym. 909, decided by Holt in 1702, in which the systematic exposition of the law of bailments is taken almost verbatim from the Institutes of Justinian. The Institutes, indeed, are directly quoted, as well as Bracton (13th century), who, as we know, incorporated large masses of Roman law.

The rule in question is far from being one that goes without saying. The Romans thought it commendable, but severe. The lower court in New Jersey disapproved of it. But we can see from the foregoing that the continuity is unbroken be-

<sup>47</sup> G. 3, 197.

<sup>48</sup> D. 13, 6, 5, 8; 47, 2, 40.

<sup>49</sup> I. 4, 1, 7.

tween the form in which it was announced by Marcus Brutus in 150 B. C., when it was already old, and its conscious application to an almost precisely similar state of facts in New Jersey in 1910 A. D.

## CHAPTER 3

## THE LAW OF PERSONS

## Section

- 37a. Citizen and Foreigner.
- 38. Father and Child.
- 39. Master and Slave.
- 40. Husband and Wife.
- 41. Guardian and Ward.

## CITIZEN AND FOREIGNER

37a. Legal rights were the exclusive possession of Roman citizens, *Quirites*. Foreigners (*hostes, peregrini*) had rights only by virtue of treaties between their states and Rome. Foreign personal dependents, *clientes*, were protected only through the person of their patron.

The fundamental division was between citizen and stranger. A citizen was a *Quiris*, a member of the *populus Romanus Quiritium*, placed by the censor in a special class and entitled to the privileges of that class. All his family got such rights as they possessed through him.

Every one else was a stranger, who had no *locus standi* in any Roman court and could not as a matter of right call upon the protection of any Roman magistrate. Soon a distinction was made between strangers who might be assumed to be enemies, *hostes*, and strangers who obviously had no hostile intent, *peregrini*. The latter obtained rights in Rome in one of the following ways. They might be in a relation of personal dependence to a Roman, *clientes*. In that case, their patron was wronged by any injury to them and could in a Roman court obtain redress for that wrong. His relation to his client had only moral sanctions, just as his relation to his son or his slave.

Or else the *peregrinus* might be member of a community

which had made a treaty with Rome. His privileges and his rights at Rome were defined by the treaty or by custom. They were often considerable and might put the foreigner almost on a par with Romans. And generally they included the right of appearing before a Roman magistrate. As we have seen, it early became necessary to assign *peregrini* to a special magistrate with imperium, the *prætor peregrinus* (supra, § 17).

### FATHER AND CHILD

38. There were four fundamental relations between citizens: Father and child; master and slave; husband and wife; guardian and ward.

(a) The father's power over his children, called *potes-tas*, originally unlimited over person and property, was gradually reduced until it became moral, rather than legal. The property of an unemancipated son (*filius-familias*), the *peculium*, was finally treated as practical ownership.

(b) Emancipation of a child severed the relationship in ancient law. Later it made little change of status.

The previous chapters have been wholly introductory. The same must be said, to a certain extent, of this chapter on the Roman law of persons. It is, to be sure, not unusual to begin a general exposition of law with this topic. Most of the modern Codes have followed this procedure. But its particular justification in the present instance lies in the fact that the Roman law of persons differed strikingly from our own, and, since the personal relations of citizens constitute an important background of the law, some discussion of these relations is necessary to render the law intelligible.

The member of the community who alone possessed *iura* in the fullest degree was the *paterfamilias*. He may be roughly defined as a free-born adult male, whose father was dead. He was generally married; indeed if he was not, he did not, after

the time of Augustus and up to Constantine,<sup>1</sup> enjoy the normal *iura* of a *paterfamilias*. It is of such a person that legal propositions are regularly made at Roman law.

The *paterfamilias* enjoyed a power which was called *manus* when applied to his wife; *potestas* when applied to his children (*filius-familias*, *filia-familias*), and *dominium*, when applied to his slaves. He had, besides, a power of vaguer content, called patronage (*patronatus*) over the slaves he had emancipated and over the foreigners who lived in Rome as his clients. Originally his power, whether called *manus*, *potestas*, or *dominium*, was of the same sort. It involved the power of life and death, and, in the case of sons and slaves, of alienation. But long before Justinian great changes had taken place in all of them.

*Manus* had disappeared. It could be created only by certain ceremonial types of marriage, which became obsolete, partly because they resulted in this power. The common consensual marriage did not place the wife in the *manus* of her husband.<sup>2</sup>

*Potestas* was early protected against abuse. A son who had been sold did not in ancient times become the slave of the purchaser, but merely a quasi slave. He frequently reverted to the power of his father, and it was provided by the XII Tables that, if he were three times sold, he became free, when the third sale was terminated. Children could be killed; but this was, of course, extremely rare, and the few instances that occurred, even as late as the Empire, were treated as examples of gross barbarity. It became customary to summon a family court before extreme measures were taken. Finally the right was altogether abolished, except in certain special cases.

The exposure of new-born infants was freely practiced. This, too, was restrained by imperial constitutions from Hadrian on, and at last forbidden altogether, although the prohibition was often disregarded. The sale of children was frequently declared invalid, and was expressly forbidden by statute. Con-

<sup>1</sup> C. 8, 58, 1.

<sup>2</sup> G. 1, 108-115; Livy, 39, 18; Tacitus, *Annales*, 13, 32; G. 1, 136.



stantine reintroduced the right of selling new-born children—a right which existed till abolished by a Novel of Justinian.<sup>3</sup>

But the *patria potestas* remained a substantial power, and was always treated as a characteristic Roman institution, in which no small degree of pride was taken. As has been stated, it did not end when the son came to maturity, but only with the father's death, unless he chose to emancipate his son. This could be done with relatively simple formalities, and the emancipated son became at once a *paterfamilias*.

The *potestas* included the right to give reasonable commands and to inflict reasonable punishments, and it entailed the duty of providing fitting support and maintenance, which duty was enforced by criminal procedure, not as a civil obligation. The *filius-familias* had no property. All that he possessed, in fact, belonged in law to his father. The contracts he made in his father's name did not bind the latter, unless he chose to be bound, and he would obviously so choose only if they were profitable. In the earlier periods—that is, apparently, till Justinian—a tort committed by a *filius-familias* engaged his father's responsibility to the following extent: He must either accept responsibility in damages, or surrender the son to the injured party, "noxal deduction," so that the latter's labor might repair the injury.<sup>4</sup>

But, if the son's property was in law his father's, the situation soon became different in fact. The *paterfamilias* might give his son certain property to treat as his own. This was called *peculium*. Most fathers would not revoke the gift, but they always had the legal power to do so. The son could make contracts which were enforceable against this *peculium*, but, if he predeceased his father, the *peculium* reverted to the latter.<sup>5</sup>

Secondly, the son would frequently be a soldier for some time. After the time of Augustus, whatever he acquired in

<sup>3</sup> Buckland, Text-Book, pp. 102-104. C. 4, 43, 2; N. 134, 7.

<sup>4</sup> G. 4, 78, 79.

<sup>5</sup> D. 15, 1, 5, 4; 41, 4, 37, 1.

military service, whether by way of pay or booty, was called *peculium castrense*. With this he always dealt as an absolute owner.<sup>6</sup>

Again, whatever he earned in any other form of public service was called *peculium quasi castrense*, and equated with the former. This seems to have been introduced by Constantine.<sup>7</sup>

Finally, any property which came to the son from third parties, on the express understanding that he and not his father was to have it, or that which came to him from members of his maternal family, or his brothers and sisters, was called *bona adventicia*, and in it his father had merely a life interest—under Justinian only a life interest in half. Justinian further treated as *bona adventicia* all property the son acquired from any one except his father.<sup>8</sup>

Noxal dedition of free persons was abolished by Justinian, and with it any responsibility of the *paterfamilias* for the torts of his children. This, with the extension of the property rights of a *filius-familias*, reduced the *patria potestas* to a mere shadow of its former despotic character; but it still involved a large number of disabilities on the son's part, and gave a specific tone to the Roman family organization.

Upon emancipation a *filius-familias* became *sui iuris*, and a *paterfamilias* himself. Theoretically all ties of kinship or of law were severed. Actually, he remained very much his father's son as to moral duties, and when the property rights of a *filius-familias* were enlarged in the manner we have seen, there was very little difference left between a son *in potestate* and an emancipated one. In the reform of the law of succession, which was the most radical of the changes made by Justinian, no difference whatever was made between an unemancipated or an emancipated son.

<sup>6</sup> D. 4, 6, 2.

<sup>7</sup> C. 3, 28, 37, 1; 12, 30, 1.

<sup>8</sup> D. 42, 5, 28.

## MASTER AND SLAVE

39. (a) The power of a master was *dominium*. Slaves were chattels, but never classed as merchandise. Personality of slaves was in imperial times protected by the criminal law.
- (b) Slaves were children of slave mothers or captives in war. Romans who were captured by the enemy became slaves, but were completely reinstated (*postliminium*) if they returned to Roman territory.
- (c) The slave's private property, *peculium*, was protected against the master only by moral sanctions.
- (d) The three forms of status, freedom, citizenship, and family membership, were called *capita*. Loss of any one of them was *capitis deminutio* (*maxima, media, minima*).

The Roman term *familia*, from which our word "family" is derived, is in Latin literature frequently used to denote a group of slaves. Its actual meaning covered all who were under either *manus*, *potestas*, or *dominium*. Of such a *familia* it is highly likely that slaves would form the largest number.<sup>9</sup>

The Roman slave was not only in every respect property, but he was the most characteristic type of movable property—the type most likely to be used by way of illustration.

Originally there was no distinction between slaves and other chattels, as far as the rights in respect of them were concerned, but there was always a difference between them in terminology. Slaves were very emphatically human beings, and the general term "chattels," we are expressly told, did not cover them. Further, in the Empire an increasing number of restrictions were imposed on the power of the owner in dealing with this species of property. Masters who treated their slaves cruelly

<sup>9</sup> D. 50, 16, 195, 2.

were compelled to sell them. Slaves could not be sold for gladiatorial purposes. Killing one's own slave became, first, a crime like the wanton injury of some one else's property, and finally was declared to be murder.<sup>10</sup>

In matters of property a slave was like a *filius-familias* (cf. supra, § 38), except that his *de facto* property rights never grew into *de jure* ones. A slave, too, had a *peculium*; but it was only self-respect that restrained a master from taking it from him. This *peculium* the slave often used to purchase his freedom. In one case we have the record of a slave who paid 60,000 hs. (about \$1,500; in purchasing power much more than that) for that purpose.

Again, like a *filius-familias*, a slave who had committed a tort was subject to noxal dedition; but here, too, the dedition could last only until the services rendered compensated for the injury.

There is a literary tradition that the Romans were hard masters. That is not borne out by the actual records, and is particularly contradicted by the inscriptions. Emancipations were frequent, and the son of a freed slave had full political rights. To be sure, servile origin, if remembered, was a social disqualification, but it was not always remembered.

Legally, those persons were slaves who were born of slave mothers, whoever their fathers may have been. Imperial legislation made much of the *favor libertatis*, the presumption in favor of liberty. If the mother were free for the briefest interval between conception and birth, the child was free born, which gave him fuller rights even than a freedman.

Capture in war also produced slavery. A *hostis* had no legal rights and his property could be seized as though it were ownerless. In actual fact, Roman soldiers on a foreign campaign received their share of the spoils, in men and goods, from the hands of their commander, rather than raided on their own ac-

<sup>10</sup> Buckland, *The Roman Law of Slavery*, p. 76 ff.; Text-Book, pp. 64-66, I. 1, 8, 2.

count. If the enemy surrendered, they became *dediticii*, which, except in special cases, meant that their lives, persons, and property would be spared.

Just as a captured *hostis* became a slave of his captor, so a Roman captured by the enemy became a slave. He suffered *capitis deminutio maxima* (cf. *infra*). His property at home was distributed in accordance to the laws of succession; his children became *sui iuris*; his marriage was dissolved, as if by death.

But it was not a full slavery. If he ever reached Roman territory—that is, territory subject to the imperium of a Roman magistrate—he became *ipso facto* free. All his former rights were resumed, as though the intervening period of slavery had not existed. His children came at once under his *potestas*; his property under his *dominium*. His marriage was reinstated. Intermediate possessors did not have to account for what had been bona fide consumed, but they were entitled to no compensation for their expenditures, except in so far as the latter constituted an unjust enrichment (*infra*, § 111).

This restoration was called *postliminium*. A form of *postliminium* was applied to property (*infra*, § 126).

In the later Empire, certain condemnations involved a loss of liberty. This was especially the case when the criminal was condemned to forced labor in the mines. But he became the slave of no definite master, and in later law it is asserted that he was the slave of his punishment. This meant, in fact, that his personal and property rights were abolished, although no person stood in the relation of *dominus* to him.

Until the time of Justinian, a free woman, who had sexual relations with a slave without the master's consent, became a slave. The same result occurred when a man suffered himself to be sold into slavery, in order to divide the purchase price with the vendor. He was deprived of the right of asserting his liberty and thus became a slave in fact. In both cases, the guilty person became the slave of a definite master.

The three types of persons, the *paterfamilias*, the *filius-fa-*



*miliās*, and the *slave*, illustrate the three different degrees of status which the Roman community recognized. Each degree was called *caput*. Both *paterfamilias* and *filius-familias* had three *capita*. They were citizens, freemen, and members of the household in which they were born. If a man changed his household—i. e., if he were adopted into another family—he lost his first *caput*. Technically he was said to suffer *capitis deminutio minima*. If he became a slave, he suffered *capitis deminutio maxima*.

The mildest form of *capitis deminutio* (*c. d. minima*) was a change in family status. A *filius-familias* might be given by his father to another *paterfamilias*. This was a case of adoption, and in the older theory the former relation of father and child was completely extinguished and the newer one as completely established as though the adopted son were one by birth.

Similarly a person *sui iuris* might put himself into the status of *filius-familias* to another man. This was called adrogation, and was obviously a real lessening of status. Adoption might often be an improvement of the status of the adopted son, but it was treated as a *capitis deminutio*, just as in the case of adrogation.

*Capitis deminutio media* was a loss of citizenship without loss of freedom. It was an incident of exile, and later of certain types of criminal punishment, deportation and the like.<sup>11</sup>

A class of citizens that occupied an exceptional place was that of emancipated slaves, *libertini*. They remained bound to their former masters (*patroni*) by certain duties and disabilities. Their patrons were their heirs *ab intestato*, and they could not disinherit them by will.

The number of emancipations a man could make, either in his lifetime or by will, was limited. This limitation was established to protect creditors. Further informal emancipations created several intermediate classes of freedmen, all of which became obsolete before Justinian.

<sup>11</sup> I. 1, 16; G. 1, 159 et seq.; D. 4, 5.

Finally, up to the *constitutio Antonina* (supra, § 30), there were foreigners in the limits of the Empire. These had such rights as the treaties Rome made with their communities gave them. If the community had been wiped out as a political entity, its members were *dediticii*. In that case the only rights they possessed were those which Roman magistrates chose to recognize. Criminal slaves who became free were put into the *dediticii* class, and it is this group which is denoted by the term *dediticii*, after the *constitutio Antonina*, until the class was abolished by Justinian.

### HUSBAND AND WIFE

40. Ancient ceremonial marriage placed a wife under her husband's authority (*manus*). Later consensual marriage did not do so.

The *dos* (dowry) was the contribution the wife made to the household.

Agreement to marry was a contract, in which the fathers as well as the spouses took part. It was not actionable, but cohabitation thereafter (*eductio uxoris*) made a valid marriage.

Divorce by mutual consent was always possible, except for a short time. Divorce by either party without cause was restricted by penal sanctions, but none the less dissolved the marriage.

We must now turn to the disabilities of women and minors. A *filia-familias* was in exactly the same position as a *filius-familias*, but her father's death, while it made her *sui iuris*, placed her in the wardship of one or another of her male kinsmen. The disabilities of wardship (*tutela*) will be discussed later (infra, § 41). They were greatly mitigated when she could appoint her own *tutor*, and particularly when she could even appoint her slave as *tutor*, so that the formal confirmation, which her legal transactions needed, were assured as a matter of course. Except in the matter of testamentary capacity (cf.

§ 152) and of suretyship (cf. § 105), a woman *sui iuris* was legally as competent as her brother.

If she married, her status might change. There was an ancient ceremonial marriage, called *confarreatio*, which made her a part of her husband's household (*familia*). She was then *in manu* and on a par with a *filia-familias*. She therefore in a sense suffered *capitis deminutio minima* (supra, § 39). This was objectionable to both the woman and her family. *Confarreatio* became exceedingly rare, and died out before 100 A. D. In the second period of our historical survey the consensual marriage, without *manus*, took its place almost completely.<sup>12</sup>

A very common incident of marriage was the constitution of the *dos*. This term is generally translated as "dowry," but such translation has wrong implications. It was the contribution the wife made to the expenses of the household. Title never vested in the husband, but he had the use and administration of the property, and was accountable for it when the marriage terminated by death or divorce. Indeed, his responsibility was enforced by an implied mortgage on all his property.

Title to the *dos* remained with the person who originally had it, and the use reverted to him on death or divorce. Or else title could be conferred upon the wife, subject to her husband's right of administration.<sup>13</sup>

Marriage itself was not strictly a contract, although consent—sometimes of a great many persons—was necessary. Its essence lay in the *deductio uxoris*, the bringing of the wife to the marital domicile. No other ceremony was necessary, and it might be done in the husband's absence.<sup>14</sup>

That the agreement to marry was not a contract is shown by the fact that no action could be maintained for its breach. Originally, however, it was very decidedly a contract which

<sup>12</sup> Sohm-Mitteis-Wenger, *Institutionen des römischen Rechts* (17th Ed.) p. 504 et seq.; Buckland, *Text-Book*, pp. 118-121.

<sup>13</sup> D. 23, 3; 24, 3; C. 5, 11.

<sup>14</sup> D. 13, 6, 5, 10; 23, 3, 68; 23, 2, 5.

was so frequently put into the obligatory form that the technical word for creating obligations, *sponsus* and *sponsa* (English, "spouse"), denoted primarily a person for whom this marriage contract had been made. But it must be noted that the contract was made not between the bridal couple, but between their *patresfamilia*rum or their tutors (cf. *infra*, § 41).

Very early the marriage agreement, still called *sponsalia*, became informal and ceased to create enforceable obligations. Its function was to serve as a basis of the marriage itself (*nuptiæ*), of which the characteristic form was the *deductio uxoris*. If the *sponsalia* were still in existence—i. e., had been duly made and not revoked by either side—subsequent *deductio uxoris* created a valid marriage, and, even if either party died before consummation, all the legal incidents of such marriage followed.

The consent of the bride and groom—doubtless customary at all times—became a legal prerequisite in the Empire. But it was implied in the absence of express dissent, and in the case of the woman dissent could only be based on moral unfitness of the proposed husband.<sup>15</sup>

While the *sponsalia* created no legal duty, there was a powerful moral duty, and, since the *lex Iulia* of Augustus, even a legal compulsion on the father's part to seek, and certainly not unreasonably to prevent, the marriage of his son or daughter. Celibacy entailed disabilities which no one willingly assumed, and which irrational opposition on the father's part might easily force on his children.

If marriage was simple and informal, divorce was almost equally so. Not only the couple itself, but their *patresfamilia*rum, could end the marriage by repudiation. And, if husband and wife were *sui iuris*, either could send the other a "bill of divorcement," sealed by seven witnesses.<sup>16</sup> This was, however, hedged in by increasing restrictions, especially under the Christian emperors. But an unjustified divorce merely subjected the

<sup>15</sup> D. 23, 1.

<sup>16</sup> D. 24, 1, 35.

guilty party to criminal punishment. The divorce was none the less valid, and the marriage dissolved.<sup>17</sup>

By mutual consent divorce was always possible. The Christian view of the sacramental character of marriage and the New Testament strictness on divorce were ineffective to change this. For a short time Justinian penalized divorce by mutual consent, but his successor repealed the penalties, alleging as the reason that an indissoluble marriage was an incitement to murder. The real fact, of course, was that not even a complete autocracy and a powerfully organized priesthood could overcome the resistance of an ingrained social institution.<sup>18</sup>

### GUARDIAN AND WARD

41. A child below the age of puberty (*pupillus*) needed a guardian (*tutor*). The tutor both authorized transactions and in the case of very young children acted for them. The tutor was held strictly accountable for competence and good faith.

Children between 14 and 25, as well as incompetent or profligate adults, might be made subject to a *curator*, whose functions were practically identical with those of a *tutor*.

There is still one personal relation to be considered, that of guardian (*tutor*) and ward (*pupillus*). If a man died while his children were very young, they became *sui iuris*. Obviously they could scarcely be permitted to, and often they were incapable of, dealing with their property. It may well be that it was rather their adult kinsmen and heirs whose interests were deemed to be imperiled rather than the interest of the orphaned children themselves. At any rate *tutela* (guardianship) was originally a prized privilege rather than a burden, and doubtless,

<sup>17</sup> C. Th. 3, 16, 2; C. 5, 17, 10; 5, 17, 11.

<sup>18</sup> N. 117, 134, 140.



when the feeling of family solidarity was still strong, the ward's property was amply protected.

It is in the *tutor's* interest that one of his functions was created. That was the interposition of his authority, *auctoritatis interpositio*, to all transactions by which the ward's property was alienated or an obligation assumed. There was no need of such interposition for a transaction that conferred a claim on the ward or added to his patrimony. And obviously there was no occasion for the interposition when the ward was a mere infant, wholly incapable of carrying on transactions of any sort.

Unauthorized transactions were simply void, and could not be ratified by subsequent interposition of authority. Yet, while a ward could sue and not be sued, even in the case of bilateral transactions like sales, he could not be enriched at another's expense, and an action for unjust enrichment would therefore lie against him (cf. *infra*, § 111). This was certainly true in the case of enrichment at the tutor's expense (D. 26, 9, 3), but third persons seem to have been without remedy against a *pupillus*, even if unjust enrichment were obviously present (*infra*, §§ 108, 111).

In his complete incapacity—a period roughly fixed at about seven years of age—or in his absence, the *tutor* must be able to do more than interpose his authority. He must act himself in his ward's name, and sometimes must act drastically and promptly. This he was enabled to do by the fiction of an agency when this difficult concept gained headway in Rome (*infra*, § 106).<sup>19</sup>

A power so extensive and so easily abused needed safeguards. Family solidarity was scarcely adequate. We find accordingly strict statutory regulation of the power of alienating the property of a ward, and abundant limitation on transactions between guardian and ward. Further, many tutors—except certain privileged groups—were required to give security before undertaking their duties. Maladministration—either by

<sup>19</sup> I. 1, 13, 17-22; D. 26, 1; 27, 3; 27, 4.

recklessness or corruption—was a criminal offense, and there was a civil action against the *tutor* for any neglect or willful wrong, an action which was guaranteed enforcement by an implied mortgage on all the *tutor's* property. On the other hand, the *tutor* had an action against his ward for disbursements and expense.

*Tutela* ended with the fourteenth year for males and the twelfth for females. This was quite in keeping with the general ancient practice of treating puberty as maturity. But the obvious inconvenience of so early an age of responsibility was soon felt in the very first growth of the city. In 198 B. C. the *lex Plætoria* (cf. *supra*, § 23) permitted young men less than twenty-five years of age (*minor XXV annis*) to avoid their transactions, and the prætor enabled them to do so effectively by *restitutio in integrum*. At some later time they transferred to the situation of a minor an institution older than the XII Tables, the *cura*, or guardianship of incompetent or profligate adults.

A *curator* had originally wider powers than a *tutor*. He might act more freely alone, and was not so largely confined to interposing his authority. But there was an increasing tendency to assimilate him to a *tutor*, and, after Diocletian, there is practically no difference between the two.<sup>20</sup>

A complete change had taken place in the conception of *tutela*. What had begun as a privilege had turned into an onerous duty. Indeed, it was called just that, *munus*, a public burden. One of the most important duties of magistrates was the proper assignment of these burdens of *tutela*. An intricate system of exemptions grew up, to prevent the excessive burdening of certain individuals already sufficiently engaged in the state service.

It was, in fact, one of the important ways in which the later Roman state solved its problem of care of dependents. There was also charitable relief, the public *alimenta*, which the im-

<sup>20</sup> I. 1, 23; D. 27, 10; C. 5, 70.

perial government organized and many local communities supplemented, but that reached only the most destitute. The compulsory *tutela* from which only a recognized excuse permitted relief, was an effective and readily administrated device for very nearly the same purpose.<sup>21</sup>

<sup>21</sup> I. 1, 25; 27, 1.

## CHAPTER 4

## OBLIGATIONS

## Section

42. Obligations Discussed.

43. Classification of Obligations.

## OBLIGATIONS DISCUSSED

42. Of the two kinds of *iura*, claims and privileges, the first involves an "obligation." This term is originally a word of ritual magic. It is extended to law by a figure of speech.

The Institutes give a famous definition of what an obligation is. Paul gives a statement of what it is not.

What a Roman citizen (*Quiris*) could enforce by means of a *legis actio* was his *ius*. He would not have said that the granting of the *legis actio* created this *ius*. He thought of his *ius* as a group of acts in respect of a thing which he should like to feel free to do, and, standing before a magistrate of the Roman people, he called upon him for assistance in preventing this freedom from being impaired. The *iura* of ownership, as, for example, the ownership of a slave, made up a group of such acts or capacities to act. A *ius* in this sense is what Mr. Hohfeld would have called a "privilege," and it is too bad that this valuable terminological distinction has not obtained wider currency.

But, side by side with a *ius* of this kind, there was another type which may be equally old. About a great many matters a Roman wished to be free to act, but about a great many other matters he wished certain of his fellow citizens not to be free; he wished them to act in a particular determinable way. He had what Hohfeld called a "right in its narrower sense," or a

"claim." At Roman law he was said to have a *ius* which involved an obligation.

The term "obligation" is a potent word, derived, it seems, from that ancient body of rites called sympathetic magic. It occurs in vows and curses and incantations generally. When a Roman said, "*Numerius obligatus est Aulo*," we find it difficult to render the exact force of the prefix "*ob*," and of the dative case of the predicate noun; but it seems to say literally that Numerius is tied up in a particular way toward Aulus. His actions are restricted. It is Aulus, and not he, who must determine what he is to do.

How did a man get himself tied up in this fashion? If we follow general analogies, a man got obligated by taking an oath, which combined both the utterance of a *formula* and the performance of a ritual. In that case he was tied up toward the gods, and if he willfully severed the bond he became a thing unclean and outcast. When, and exactly how, men first tied themselves up in respect to other men, as well as toward the gods, we do not know; but it is evident that the potent word and the efficacious ritual played an important part. A man, that is, obligated himself, and could incur an obligation in no other way. And, just as in the case of an oath, the divine bond involved could not be severed without sacrilege, so, in the case of the human obligation, the bond could not be severed without violating the common opinion which held it to be valid. The ancient *iudex* with *imperium* would command the obligor to act as his bond compelled him. In doing so he declared that the action of the obligor was a *ius* of the obligee. He put a legal seal upon the obligation which the defendant had created for himself.

Now, in the ordinary affairs of life, men become involved or tied up with each other in various ways. Some of these ways the law will seal as obligations; that is to say, the court selects from the bonds that unite men certain ones as more important. Which bonds will be selected is largely a matter of historical accident. And with the element of uncertainty implied in the existence of courts it soon becomes understood that the transac-



tion between parties, the *negotium*, does not become an obligation by itself, but merely because the court is likely to enforce it.

We are ready now to examine the famous definition of an obligation which occurs in the Institutes of Justinian, and which cannot very well be translated, but may be paraphrased as follows: "An obligation is a bond created by law. This bond we can be compelled to sever by the performance of some act, as far as the laws of our community permit that act to be performed."<sup>1</sup>

This is very different from the earlier idea, in which the *ius* (claim) of the obligee is the creation of the obligor himself by the performance of some ritual act, and the *ius* (privilege) is a freedom of action, which a Roman regarded as antecedent even to communal life, and which he would be puzzled to detach from his personality. The obligation of our definition exists only because the law has set aside certain transactions, put a mark upon them, and declared that they constitute a bond between the parties of such a nature that one of the parties may not sever it at will, but only by the performance of a specific act. And the Roman magistrate would lend such assistance as he could to compel him so to perform.

There is an almost equally well-known statement of what an obligation is not. "The essence of an obligation," says Paul, "does not consist in this, that it makes some object or some right concerning an object our property, but that it binds some one to us."<sup>2</sup> The result of the obligatory transaction is, not that our capacities to act are enlarged, but that some one else's capacities are restricted.

<sup>1</sup> I. 3, 13, pr.

<sup>2</sup> D. 44, 7, 3, pr.

## CLASSIFICATION OF OBLIGATIONS

43. Gaius has three classes: Contract; delict (tort); miscellaneous.

Modestinus has seven, omitting the term "contract," and using three bases of contract, performance, form, and agreement. Four more classes were added: Wrongful act; statute; executive order; and "necessity"—a peculiar Roman situation.

The Corpus Juris has four: Contract; delict; quasi contract; quasi delict.

How are the obligatory transactions to be discriminated from others? That question is asked in every system of law. The answer must of necessity be that it is an historical accident.

The classification of these situations serves a pressing practical need. Some easy means is required to discriminate the many transactions and situations which the magistrate will let severely alone from those to which he will give his indispensable aid. Several such classifications were attempted.

We know the classification made by Gaius (*supra*, § 31), because it is also the classification of the common law. Obligations, many of our books still say, are founded on contract or tort, which, with "implied contract" and "contract of record," would, at a pinch, cover, or seem to cover, almost any situation that got into court. Gaius, however, was not quite so primitive. He admitted a miscellaneous class "from various types of situations."<sup>3</sup> Common law in the nineteenth century did not get further than to add the miscellaneous class of Gaius to its list of obligatory transactions, by adopting the term "quasi contract," although many courts and writers of digests have, apparently, not yet got so far, lest they should seem to show an indecent haste in overtaking Gaius.

Modestinus (*supra*, § 31) made a suggestion which found

<sup>3</sup> D. 44, 7, 1, pr.

little favor.<sup>4</sup> He abandoned the word "contract" altogether, and used in its place the various bases of contract—performance on one side, stipulation, a formal contract of which we must say much (cf. *infra*, §§ 54–59), and agreement. To these he added statute, executive order, and finally wrongful act, as well as what we might call externally imposed necessity. He had accordingly seven sources of obligation and a classification that avoided pretty completely any abstract analysis.

The classification of Modestinus has distinct merit, but we shall be unable to do very much with it, so firmly have "contract" and "tort" established themselves as two co-ordinate and equally important bases of obligation. It will be noted that the first three, all treated as contracts in the ordinary terminology, have in common the element of conscious co-operation. The others lack this element, and three of these we may examine very briefly.

When Modestinus speaks of an obligation *ex necessitate*, he is referring to a situation like the following: A slave is made his master's heir. He has no choice but to accept, or, rather, the inheritance, with all its debts as well as its assets, is his without being assumed. This is a situation peculiar to the Roman law, which has no real counterpart in ours. Again, by statute, a duty may be specifically imposed on A. toward B., or a command of a magistrate may direct A. to do some act in B.'s interest. The obligation issues out of the *maiestas* of the legislative body or the *imperium* of the magistrate. It is, to be sure, a *vinculum iuris*, a bond of law. It has all the attributes of the definition of the Institutes. But it will be seen that both of the parties bound to each other in these situations are passive; that neither took any active steps which resulted in the creation of the bond.

Finally, there are certain acts which public opinion reprobates. These acts are wrongs, and the wrongdoer finds himself under an obligation to pay money or deliver a *res* to the person wronged. Surely there is no conscious co-operation here. In-

<sup>4</sup> D. 44, 7, 52.

deed, we cannot say in any useful sense that even the obligor's act created the obligation, since it was not directed to any such end, but had a wholly different purpose.

The duty to obey a statute or a command of the magistrate is something which we do not need the concept of an obligation to understand. Commands issuing from such a source must have been drastically enforced, long before the curious idea of binding up was ever transferred from the ritual of magic to that of stipulation. It was of the essence of the magistrate's *imperium* that he could coerce. One of the symbols of his office was the ax and rods. He had no need of imposing an obligation who could use the dreadful words: "*I, licitor; caput obnubito: arbori infelici suspendito*"—"Go, licitor; veil his head, and hang him to the baleful tree."<sup>5</sup>

But, although the magistrate preserved order, and would doubtless prevent outrage between citizens in his presence, it was no part of his task to vindicate, of his own motion, wrongs committed elsewhere. That was originally a matter of private vengeance. But, in the later period, when private vengeance was much restricted, even an unprovoked outrage was to be redressed by means of a formal action; it was one of the situations set aside and marked by law as an obligation.

Finally, we have the classification of the Institutes which recognize four groups: (1) Contracts; (2) delicts, or torts; (3) quasi contracts; (4) quasi delicts.

Although delicts are second in the order here given, they will be treated first.

<sup>5</sup> Livy, i, 26, 6, 11.

## CHAPTER 5

## DELICTS

## Section

- 44. The Delictual Action.
- 45. Conversion—*Furtum* and *Vi Bona Rapta*.
- 46. Parties to the Action of *Furtum*.
- 47. Effects and Incidents of the *Actio Furti*.
- 48. *Iniuriæ*.
- 49. The *Lex Aquilia*.
- 50. Contributory Negligence.
- 51. The Generalization of the Aquilian Action.
- 52. Miscellaneous Delicts.
- 53. Quasi Delicts.

## THE DELICTUAL ACTION

44. The characteristic of the Roman delictual action is that it is penal, and not compensatory. The penalty is generally a multiple of the damage done.

At the Common Law the nature of the obligation created by a wrongful act is in general undisputed. The purpose is compensation. The victim is to be made whole. Money damages, which alone courts of law were empowered to give, are concededly rude and approximate, and in an increasing number of cases courts of equity will give what is called specific reparation, while for some threatened torts, and for most cases of a threatened series of torts, an injunction will lie; i. e., the assumed offender is threatened with imprisonment if he repeats or continues the wrongful act.

At Roman law, the delictual obligation was dominated by another idea. It was penal.<sup>1</sup>

*Pæna*, the penalty, is properly the ransom which the injured man may demand from the wrongdoer, whom, in the exercise of self-help, he has seized *flagrante delicto*. We may plausibly

<sup>1</sup> D. 50, 16, 131; 42, 8, 25, 1; I. 4, 6, 18.



guess that the magistrate intervened first to free the wrongdoer if he had paid the *pæna*, and to refuse to free him unless he did so. Finally he intervened to prevent seizure until the claim for the *pæna* had been perfectly made out. It is clear that this ransoming penalty is in no sense the equivalent of the damage sustained, but is a means of placating the victim's wrath. It is a satisfaction with which the magistrate will force him to be content, in lieu of the more primitive satisfaction of a bloody vengeance on the transgressor.

Compensation was something wholly apart from the penalty. When the delict consisted in depriving a person of his property, the wrongdoer had, of course, to restore the property, or its equivalent; but he would have to do that if he detained the property under an honest, but mistaken, claim of right. The penalty was the characteristic mark of the delictual action, and in such cases as property delicts it was calculated at some multiple of the value of the property taken, two, three, or four times that value.

In the Institutes of Justinian, four delicts are mentioned, and a chapter (title) is devoted to each. *Furtum* (theft; conversion); *vi bona rapta* (forcible theft; robbery); *legis Aquiliæ* (Aquilian action for destruction or injury to property; trespass); *iniuriæ* (insult; libel; slander). This list is far from being exhaustive and would not give a complete account of actionable wrongs, even as early as the Twelve Tables; but it is astonishing how many, even of the almost infinitely multiplied types of torts of the present time, can be gathered under one or another of these heads.

## CONVERSION—*FURTUM* AND *VI BONA RAPTA*

45. *Furtum* is wrongful intermeddling with another's use or right to use. The three degrees are *f. manifestum*, *f. nec manifestum*, and *vi bona rapta* (robbery). The penalty was fourfold, twofold, and threefold damages, respectively.

Active assistance by word or deed rendered the accessory equally liable with the principal.

Some cases of fraudulent obtaining of property were included in *furtum*, as well as cases in which a bailee wrongfully used property.

The essence of the wrong lay in such a meddling with any movable property that would have been inconsistent with a rightful use of it by another person, if that other person had at that time chosen to exercise his right; such a meddling, that is to say, that denied the rightful title or possession or use of another.<sup>2</sup>

Clumsy as the above statement is, it is necessary in order to exclude the common confusion of *furtum* with theft, as we generally understand it. There are often a number of persons who have rights of various kinds in connection with the same thing (*res*). Any one of these persons might have a claim in *furtum*, and any one of them, or any complete stranger who blocks the free exercise of such rights, by any act directly affecting the *res*, might be guilty of *furtum*. But the wrongful act must bring the offender in physical contact with the property. Thus, if A. owned a slave and wished to seize him, and B. forcibly prevented A. from doing so, that might be some other tort, but not *furtum*.

To the general statement just given there was one exception. If B. injured or killed the slave for no other purpose than that A. might not use him, this again was a tort, but not *furtum*. The requirement which certain decisions laid down—that *furtum* implied a desire to profit on the part of the wrongdoer—was, in actual application, little more than an attempt to state positively what has just been illustrated negatively.<sup>3</sup>

There were three degrees of this tort—*furtum manifestum*, *furtum nec manifestum*, and *vi bona rapta* (robbery).<sup>4</sup> These

<sup>2</sup> D. 47, 2, 1, 3; I. 4, 1, 6.

<sup>3</sup> D. 47, 2, 55, 1.

<sup>4</sup> I. 4, 1; 4, 2; D. 47, 2, 2; 47, 8, 1; 47, 8, 2. Robbery is classed as a special tort, but it is in reality simply one degree of theft. The

degrees really concern *furtum* only in its narrowest, but probably its original, sense—actual larceny. The distinctions between the degrees are as follows: If the *res* is claimed by the owner before it has been placed somewhere for safe-keeping, it was *furtum manifestum*, “manifest theft,” and a fourfold penalty could be recovered. If the *res* was claimed afterward, it was *furtum nec manifestum*, and a double penalty only could be recovered. If the theft had been accompanied by force, no matter when the *res* was reclaimed, it was robbery, and the penalty was threefold.

Robbery, indeed, is justifiably treated as a separate delict, in spite of the fact that it is merely an aggravated case of theft, because it is unqualifiedly theft, and does not possess the various applications and nuances of which *furtum* is capable.

The following instances will illustrate the nature of the actions:

Ælius, in the absence of Mævius, drove off the latter's cattle into his own pasture. Mævius had the *actio furti* for twice the value of the herd, besides being able to recover the animals themselves.

Ælius drives off the herd in spite of the active resistance of Mævius, the owner. Mævius may sue, in the *actio vi bonorum raptorum*, (robbery), for three times the value of the herd.

If in either of the above cases Mævius and his friends pursue and overtake Ælius before he has secured the stolen cattle in his own inclosures, Mævius has the *actio furti manifesti* for four times its value.

If, instead of driving the herd off into his own pasture, Mævius had merely stampeded it out of wanton mischief, no action of *furtum* would lie (cf. *infra*, § 49).<sup>5</sup>

Any person who had given active assistance in word or deed (*ope et consilio*) to Ælius was equally liable to Mævius, and the

older differentiations of *furtum conceptum*, *oblatum*, *prohibitum*, still in operation in the time of Gaius (G. 3, 192), were obsolete in the time of Justinian.

<sup>5</sup> I. 4, 1, 11; D. 47, 2, 36, pr.

full penalty could be recovered from every one of the several tort-feasors. Indeed, the accessories could be sued, even if the principal could not be. Such a case arose when the thief was a *filius-familias*, a freedman, or even a day laborer living in the house of the *paterfamilias*, in which situation action by the latter had been barred from very ancient times by the prætor's edict.

Actual assistance was necessary, and mere advice or persuasion would not be enough. Often it must have been a nice question of fact to discriminate between active assistance and mere persuasion, and the discrimination would necessarily be left to the discretion of the court.<sup>6</sup>

But the action of *furtum* was much more extensive than these obvious applications indicate. There was *furtum* whenever a bailee used the bailed article otherwise than the contract provided, or to a larger extent than the contract provided. It made no difference whether the bailment was gratuitous or for compensation. The ancient instance, to which attention has already been called, is a case in point.<sup>7</sup>

It is true that the Roman law required deliberate intent. It is laid down that, if the borrower supposed that the bailor would consent to this additional or modified use, there was no *furtum*. The converse was also true. The borrower may have deliberately transgressed what he supposed to be the limits of his use, although, as a matter of fact, the bailor had intended the borrower to make this additional use of the *res*. Again there was no *furtum*.

Evidently, unless these cases are purely hypothetical, the "intent," so sedulously sought after, must have been concretely evidenced. Unless the borrower in the first instance could show a reasonable ground for supposing that he had his bailor's consent, it cannot be supposed he would be relieved of liability. In view of the severely penal character of the action, it was only equitable that good faith should be protected; but the innocent trans-

<sup>6</sup> I. 4, 1, 11; D. 47, 2, 50, 1.

<sup>7</sup> Supra, § 37, and notes.

gression might be assimilated to an accident. In the second case, although the moral responsibility is as great as in theft, it is at best a frustrated attempt to commit the tort, since, as a matter of fact, no invasion of the property right of the owner had taken place.

Another extension of *furtum* included cases which we should be inclined to class as deceit. Ælius, representing himself as Mævius or Mævius' agent, receives from Sextus goods or money intended for Mævius. Ælius is guilty of *furtum*. A distinction, however, is made here of a sort familiar to us in the common law of sales and contracts. If Sextus intended the particular person before him to obtain the title to the goods, whatever may have been his error, or whatever fraudulent representations may have induced him to wish the title to be in Ælius, no *furtum* was committed, although an action for deceit would lie.<sup>8</sup>

There is an even more striking application. To receive payment of an assumed debt, knowing that no debt was due, was *furtum*, even though the recipient had not contributed to the erroneous payment by word or sign. This was scarcely inequitable; but it constituted an obvious anomaly, since the person paying intended property in the coin to pass, and it is almost impossible to distinguish this case logically from the obtaining of goods by false pretenses. But, if not logical, it was an obvious attempt to enforce a decent mercantile standard by something severer than a mere duty of restitution, which is all that an action for deceit enforced.<sup>9</sup>

## PARTIES TO THE ACTION OF *FURTUM*

46. (a) The plaintiff's claim to use or possession must be rightful.
- (b) A pledgee or usufructuary may bring the action, excluding the owner, unless the *res* was destroyed.

<sup>8</sup> D. 47, 2, 43, 1.

<sup>9</sup> D. 46, 3, 38, 1; 13, 1, 18.



- (c) A bailee, subject to the owner's right of recaption at will, had the action, if he was liable to the owner and solvent; otherwise, only the owner had it.
- (d) Criminal prosecution generally was alternative to the civil action.
- (e) Action for robbery was sometimes alternative and sometimes supplementary to the *actio furti*.

A great many difficulties have been found in the fact that others beside the owner may bring the action of *furtum*. But there is no reason to suppose that the Roman law, even in its earliest stages, ever confined the action to the owner. Whatever right in the *res* was denied by the act of another was an adequate basis. So an owner who pledged his goods to his creditor was obviously guilty of *furtum*, if he improperly repossessed himself of them. And the same would be true if the owner had retaken an article from his bailee when his bailee had a lien upon it for services or expenses.

Frequently enough a single act may interfere with the rights of several persons. That is the case when there are several joint owners, but it is also the case when there are several rights of different kinds in connection with the *res*. The *res* may be taken from a bailee, a usufructuary, a pledgee, a stakeholder, a *bona fide* possessor, a thief, or a trespasser. In all these cases there is an owner, the *dominus*, and there is also another person, who at the time of the theft is in actual possession of the article.

First of all, we have the rule that the plaintiff's possession or claim must be itself rightful. A thief or trespasser would not be heard. He might, in cases of violent dispossession, be restored by an interdict (*supra*, § 23), and by a late constitution, apparently, he might acquire the title by the true owner's recklessness; but in no case could he maintain a tort action, with penal damages, against a person who was certainly no more a wrongdoer than himself.<sup>10</sup>

<sup>10</sup> D. 47, 2, 12, 1; 47, 2, 77, 1; C. 8, 4, 7; I. 4, 2, 1. Cf. D. 47, 8, 2, 18.

Then there is the case in which the article is in possession of one who for a limited time, or to a limited extent, might have excluded the owner himself, such as a usufructuary; i. e., one who has a right to the exclusive use and enjoyment of a *res* for a definite period, or a pledgee, who may hold the *res* against the owner until the condition of payment is fulfilled. In these cases both possessor and owner had the action of *furtum*, but the basis of computing the penalty was different. If the thing had been stolen from the usufructuary, he might recover twice or four times the value of his use and enjoyment, which was often easy enough to estimate. The owner, on the other hand, could recover the multiple of his actual loss, and this would be the value of the article, deducting the value of the usufruct, if it could not be recovered, and practically nothing, if the thing was returned intact as soon as the usufruct was terminated. It might accordingly happen that a thief, who had taken an article from a usufructuary and promptly returned it, would be compelled to pay only a slight amount, while an exactly similar theft from the owner, followed by immediate restitution, would render the thief liable for twice or four times the full value of the article.<sup>11</sup>

In the case of a pledge the situation was very similar. The pledgee would get the multiple of his loss, which would be the debt secured, if the article could not be recovered. The owner, on the other hand, could sue for a multiple of the excess of the article's value over the debt, since that was the interest which, at the moment of theft, he had in the *res*. How this was complicated by the obligations between bailor and bailee, etc., we may have occasion to see later (cf. *infra*, §§ 65, 66).<sup>12</sup>

But a different situation arose when the control which the bailee rightfully had in the *res* did not exclude the owner, who might, at will, retake the article, although by such retaking he became subject to a contractual liability. These were cases of loans for use, whether gratuitous or compensated, including

<sup>11</sup> I. 4, 1, 13; D. 47, 2, 46, 1.

<sup>12</sup> I. 4 1, 14; 47, 2, 12, 2.

bailments to carriers, innkeepers, and craftsmen. The interest of the bailee is measured by the value of the article, if he is responsible for the return of it. The interest of the bailor is either the full value of the *res* or nothing, if he can hold the bailee responsible. From these two facts it followed that, if the bailee for any reason is not liable for the loss to the bailor, he has no action against the thief, and the bailor alone has such an action. If, on the other hand, the bailee is responsible and solvent, a qualification to be noted, he alone, and not the bailor, has this action.

An amendment by Justinian dealt with the case of *commodatum*, the gratuitous loan for use. The owner was put to his election. If the bailee was liable under his contract, the owner might sue the thief. But his election was conclusive, unless he was ignorant of the theft. The bailee must therefore have been discharged, whenever the bailor chose to proceed against the wrongdoer. We must suppose that his own right to proceed against the thief was suspended until the bailor had made his election.<sup>13</sup>

There is a certain confusion in the Digest on most of these matters, and it is obvious that there had been a lively controversy about them. Perhaps the confusion and the unsettled controversies were both due to the fact that the action, while drastic in form, must often have been ineffective, because of the insolvency of the defendant. Rascals of this sort rarely have leviable property, and execution against the person was neither always available nor satisfactory.

We must not forget in all this that we have been dealing with a civil suit, an action for damages, even though the damages are wholly penal. But the thief was likewise criminally punishable. The magistrate had a large discretion concerning the nature of the punishment, as he always had in criminal cases; but the penal character of the civil suit is again indicated by the fact

<sup>13</sup> I. 4, 1, 16; C. 6, 2, 22.

that the criminal proceeding barred a civil suit, and doubtless *vice versa*, even though the magistrate chose to be lenient to the offender.<sup>14</sup>

Most of the statements made about *furtum* applied to the tort of robbery, *vi bona rapta*. The action had the peculiarity that it combined a suit for the penalty (threefold) with an action for the recovery of the *res* or for compensation. In ordinary *furtum*, these were quite separate. However, if the *res* or compensation had already been obtained, the action lay for the penalty alone. And if twofold damages had been obtained in an action for *furtum nec manifestum*, the action of *vi bona rapta* might still be brought for the additional penalty. But the converse was not true. If, by error, a plaintiff sued for robbery, he could not thereafter sue for manifest theft, although this had a larger penalty.<sup>15</sup>

In those instances in which there were several possible plaintiffs, the same rules held as in *furtum*. It is to be noted, however, that the mere fact of violent theft relieved most bailees of responsibility. In that case only the bailor had the action of *furtum*.

In view of the large number of criminal statutes on the subject, it is not likely that a civil suit barred criminal prosecution for robbery, or the converse.

### EFFECTS AND INCIDENTS OF THE *ACTIO FURTI*

47. (a) Like all delictual actions, it survived the injured person, but not the wrongdoer. Condemnation produced *infamia*.

<sup>14</sup> D. 47, 2, 92; 47, 2, 57, 1. It seems likely that in certain cases of theft both the civil and the criminal suits might be prosecuted.

<sup>15</sup> D. 47, 8, 1.

- (b) Whether *furtum* lay or not, a dispossessed owner of movables could bring *vindicatio* (replevin); *actio ad exhibendum*, to have the *res* brought before the court; interdict; and the *condictio furtiva*, like the modern common-law action of conversion.

The existence of a penalty of some sort marked all tort actions. There were also two other characteristics, which are generally found in such suits, and are often taken as signs of their delictual nature.

The first is that the claim survives in favor of the injured person's heirs, but not against the wrongdoer's heirs. It seems to have been a generalization of this fundamental rule in Roman delicts which gave rise to the common-law maxim, "*Actio personalis moritur cum persona*." <sup>16</sup>

The second is that condemnation in such an action involved infamy. *Infamia*, in Rome, was not a mere moral reprobation, but carried with it certain well-defined disabilities. These were, first of all, disqualification for public office and incapacity either to be represented by counsel or to represent any one as counsel in a lawsuit. Apparently there were other disqualifications. *Infamia*, however, was also a consequence of condemnation in some contractual actions of a fiduciary character, and was further inflicted by the magistrate for certain reprehensible kinds of conduct; e. g., clandestine marriages, hasty espousals of widows, the assumption of one of several degrading tasks, particularly public stage performances. <sup>17</sup>

Whether an owner of a *res*, or one who had a definite interest in it, chose to use his delictual remedy or not, he could always proceed to recover his property. He had the following choice or combination of remedies:

- (1) *Vindicatio*.—He might lay claim to the particular *res*

<sup>16</sup> I. 4, 12, pr.; 4, 12, 1; D. 47, 1, 1, pr.; Finlay v. Chirney, 20 Q. B. Div. 494, 57 L. J. I. B. 247 (1888).

<sup>17</sup> G. 4, 182.



of which he had been deprived. The original method, by *legis actio*, of bringing the thing before the prætor and there trying title, was continued in the forms of the *formula* and the *cognitio*, although the drastic self-help underlying the *legis actio* was no longer permitted.<sup>18</sup>

(2) *Actio ad exhibendum*.—If there was a risk that the *res* might be disposed of, the defendant might by an *actio ad exhibendum* be ordered to bring it before the court. This action was therefore preparatory in character.<sup>19</sup>

(3) *Condictio furtiva*.—If the *res* could not be found, or had been destroyed, the owner—and doubtless the usufructuary—might sue for its value. This was not a delictual action, but quasi contractual, and lay against the heirs of the wrongdoer as against himself. And it also lay against a donee or purchaser from the thief. Whether, as at the common law, an action could be maintained against a bona fide mesne purchaser, who no longer had the *res*, is doubtful and hardly likely; but *vindicatio*, of course, lay against any one who had stolen property in his possession, however innocently acquired, and the same would be said if he had deliberately stripped himself of possession to avoid this liability.<sup>20</sup>

### INIURIÆ

48. This included trespass to the person in its largest extent. It was recognized in the XII Tables, if the trespass did not amount to mutilation, and a fixed money penalty imposed. The basis was not the physical pain, but the impairment of dignity.

The later action developed in the prætor's court and was supplemented by the *lex Cornelia*. It involved taxation of penalty by the plaintiff.

<sup>18</sup> I. 4, 1, 19; D. 47, 2, 54, 3; 13, 1, 7, 1.

<sup>19</sup> D. 10, 4; C. 3, 42.

<sup>20</sup> D. 13, 1; C. 4, 8.

Publicity made the wrong *atrox* and justified a greater penalty.

Any person, besides the injured one, whose reputation might suffer incidentally, had the action.

Witchcraft, malicious lawsuits, and nuisance were equally actionable under it.

It was lost by very slight laches.

Satirical writings were particularly aimed at by the later law, but it is evident that the law was rarely enforced against them.

It is likely that *furtum* and *iniuriæ* (also found in the singular form, *iniuria*) seemed in very early times to exhaust the idea of wrongful conduct between man and man; the former as a trespass on his goods, the latter as a trespass on his person. And while this second sort of trespass received a general and miscellaneous designation, it was in fact the specific and unmistakable wrong of bodily assault which it primarily called to mind.

Religious ideas of a deep-rooted and wide-spread character in the Mediterranean had identified the body and what we call the person. It is for that reason that mutilation—the loss of a limb—was nonjusticiable, even as late as the XII Tables. No action would lie here, and nothing but *talion*—that is, the infliction of a similar injury on the offender—was adequate. But, if it was an assault short of mutilation, the analogy with *furtum* was admissible. In *furtum*, one might have restitution, plus a penalty. In an assault that did not end in mutilation, restitution already existed in the saving of one's skin whole, and a proper penalty could be demanded as well.<sup>21</sup>

It was not the pain and suffering caused by an assault, but the impairment of dignity, which seemed essential to an ancient Roman, and this conception remained fundamental. Compensation did not enter into the question. The sum demanded in the action was a property penalty, indistinguishable from

<sup>21</sup> Festus, *sub voce talionis*, Aulus Gellius, 20, 1, 37, 38.

our fines, except that it went directly to the person injured, and was created to make such aggressions rare, because unprofitable. It was originally a fixed sum, which became ridiculous when the value of money fell.<sup>22</sup> Finally a different method was devised for assessing the penalty. The plaintiff proposed an amount which served as a maximum. The *iudex* might then reduce it to a reasonable sum, if it seemed too large.<sup>23</sup>

This method of fixing the penalty may be no older than the use of the *formula* in the urban prætor's court, that is, than 150 B. C., although we cannot be certain that some of the later forms of the *legis actio* would not admit of this type of taxing damages. At any rate, the action, as based on the XII Tables, gave way in practice at a very early time to the prætorian action, the *actio iniuriarum* proper. A statute of Sulla, the *lex Cornelia de iniuriis* of 81 B. C., added, it seems, criminal penalties which could be enforced in addition to the money penalty of the prætorian action. The criminal action was confined to assault and battery, whether it was a mild or an aggravated assault, and any unauthorized invasion of one's domicile. Like other Cornelian statutes, it contained a number of miscellaneous provisions, of which a special one may be mentioned. It was provided that the plaintiff might offer the defendant the oath, and if the defendant took it the case was dismissed. This, as has been said, was a marked characteristic of the later cognition procedure (*supra*, § 32) and was relatively rare in the older law.<sup>24</sup>

It may be noted that, although the oath was enacted for the criminal prosecution under the *lex Cornelia*, by a generally

<sup>22</sup> Aulus Gellius, *Noctes Atticæ*, 20, 1, 13. This is the famous story of Lucius Veratius, who walked through the city, followed by a slave bearing a bag full of coins. As he met inoffensive passers-by, he would strike them in the face and order his slave to pay them the statutory fine of twenty-five *asses*. This was about seventeen cents at the time, although at the time of the XII Tables it was over \$4 in monetary value and many times that in purchasing power.

<sup>23</sup> Aulus Gellius, *Noctes Atticæ*, 20, 1, 13; G. 4, 182-184.

<sup>24</sup> D. 47, 10.

followed decision of Sabinus (*supra*, § 27) it was applied to the civil suit as well.<sup>25</sup>

The bodily assault of the XII Tables and of the Cornelian law had long been supplemented—in one special instance by the XII Tables themselves—by the delict of libel and slander. Derogatory statements, and, above all, open vituperations by tongue or pen, came under the scope of the action, and apparently publication was not essential. Yet the public or private character of the insult obviously made a difference, in determining whether the injury was *atrox* or *levis*, of greater or less seriousness. The former, *atrox iniuria*, authorized larger damages, intensified the criminal penalties, and even justified so great a breach with Roman tradition that, for it, a freedman might maintain an action against his patron, a son against his father.<sup>26</sup>

One of the most important considerations in this delict concerned the status of the persons affected by it. A commonly cited illustration is that of an insult offered to a married woman. This gave an *actio iniuriarum* to her, her husband, her father, her son, or her brother, or to any one who had the duty of protecting her. The inferences which those who saw or knew the affront might draw was that her male protectors were too feeble or too cowardly to resent the insult. And all these possible plaintiffs might sue in separate actions, and every one of them assess a separate penalty.<sup>27</sup>

However, an unnecessary multiplication of actions was not encouraged. This type of wrong is rarely perpetrated by a single act, but by a group of acts recurring at about the same time. The injured person was not permitted to treat every element of the incident as a separate tort, but was required to join them all in a single suit.

Trespass, battery, libel, slander, are therefore partially covered by the *actio iniuriarum*. Even a mere assault which stop-

<sup>25</sup> D. 47, 10, 5, 8.

<sup>26</sup> I. 4, 4, 9; D. 47, 10, 7, 6.

<sup>27</sup> D. 47, 10, 7, 5.

ped short of battery was material for an action on the case, the *utilis actio iniuriarum*. All these things tended to humiliate the victim in his capacity as a man and a citizen, and only to the extent that they were so intended—or would be so understood—were they actionable. It is not easy to understand why the giving of drugs to a person to deprive him of his reason was also a basis for the *actio iniuriarum*. Labeo asserts it, and the Digest re-enacts it. The case may be purely hypothetical, and it certainly was not common; but it may be a remnant of a more ancient situation, in which, among the chief bases for the action, were magical incantations and other forms of witchcraft—the “evil eye,” as well as the evil tongue.<sup>28</sup>

Far removed from this ancient dread was something that sounds quite modern. A vexatious lawsuit maliciously instituted was certainly a ground for the action of *iniuriæ*, and particularly if it impaired one's credit. So it is held that, if demand is deliberately made on the sureties of a solvent and willing debtor, the debtor may sue for the wrong done him.<sup>29</sup>

And finally a nuisance maliciously caused one's neighbor gave that neighbor the action. The case mentioned in the Digest refers to a smoke nuisance, but there is nothing to indicate that this type of interference with occupation could not be generalized. It is likely enough that “spite” fences could have been reached in the same way—particularly as the gravamen of the complaint in the *actio iniuriarum* is regularly “spite,” a malicious desire to do evil to another person.<sup>30</sup>

In a society in which position and class are more readily recognized than they are with us—a society, that is to say, like that of ancient Rome and, to a less extent, modern Continental Europe—a greater sensitiveness would be felt to the loss of standing which insult or injury brought about. It was therefore only those who really possessed this sensitiveness who might complain. This was expressed by the words *dissimula-*

<sup>28</sup> D. 47, 10, 15, pr.

<sup>29</sup> D. 47, 10, 13, 3.

<sup>30</sup> D. 47, 10, 44.



*tione aboletur*, "to endure the wrong with apparent patience, is to lose the remedy for it." If the wrong, whether perpetrated by word or deed, was not promptly resented, even by those too feeble to prevent it, no action lay. Humility was not a virtue of ancient society.<sup>31</sup>

Another special point to notice in this action was the fact that it died completely with the person of either victim or wrongdoer, differing in this respect from other tort actions (*supra*, § 47).<sup>32</sup> If, however, *litis contestatio* had already been reached, that, as we remember, worked a procedural novation. It created an inchoate claim, which needed only the determination of a fact to become an obligation. After *litis contestatio*, therefore, even in so highly personal a suit as the *actio iniuriarum*, the death of either party had no effect on the action.

The particularity and severity of the law on this topic seem strange, if we keep in mind the fact that vituperation is so marked an element in extant Greek and Latin literature. In fact, the legal texts deal in specific cases with satires and epigrams, and it is provided that anonymity and indirectness shall be no defense. But obviously the enjoyment of this type of literature was too strong for the law in the greater days of Rome. If the powerful Metelli silenced the poet Nævius in 200 B. C., Catullus abused Cæsar and his henchmen with complete impunity, and Horace, Martial, and Juvenal denounced contemporaries whose identity must have been apparent at the time, evidently without any reason to dread serious consequence—and this despite a *senatus consultum* which penalized the sale or publication or transfer of such poems, and even the accidental finding of them, if they were not immediately destroyed after their character became known.

<sup>31</sup> D. 47, 10, 11, 1.

<sup>32</sup> D. 47, 10, 13, *pr.*

## THE LEX AQUILIA

49. This old statute was meant to cover all cases of trespass to property that were neither malicious nor resulted in profit to the wrongdoer.

It was compensatory, with a slight penal incidence, double damage, if it was allowed to go to judgment, and the value estimated at the highest within a year or thirty days.

The basis was negligence, *culpa*.

If the wrong was not done by physical contact with the thing, an *actio in factum* lay. The adapted action, *utilis actio* of the Aquilian law, was confined to certain specific situations.

The term *iniuria* (*iniuriæ*), which seemed in very ancient times to cover every tort that needed redress and was not theft, became the specific name of the kind of personal trespass which affected a person's standing. But other wrongs came into notice, which were neither the one kind nor the other, and an ancient statute, the *lex Aquilia*, was passed to cover them. The word *iniuria* applied to them also, since *iniuria* was a common word, meaning "unlawful conduct," and continued to be used in ordinary speech as well as in its technical legal sense.

Trespass, assault, battery, libel, slander, malicious prosecution civil or criminal, nuisance, were all grounds for an action *iniuriarum*, if a malicious purpose was apparent. But, even without malicious purpose, many of these things could be seriously detrimental to the person who suffered under them. In the same way, to profit by another man's loss of property was theft; but his loss was no less, though you did not profit by it. In both these situations, the wrong that would have been *iniuriæ*, if there had been malice, and the wrong which would have been theft, if there had been gain for the wrongdoer, were cognizable under the *lex Aquilia*.<sup>33</sup>

<sup>33</sup> I. 4, 3; D. 9, 2.

An illustration will make this clear. Aulus has a slave, Stichus, whom he apprentices to a shoemaker, Numerius, to learn the latter's trade. Numerius punishes the slave for a trifling fault so severely that he dies. Aulus has lost a slave, but Numerius has not stolen one. And the facts negative any purpose on Numerius' part to lessen Aulus' estimation in the community. Yet Aulus is unmistakably damnified, and the damage should certainly be made good.<sup>34</sup>

Two circumstances have to be considered. The penalty character of the action can scarcely be insisted upon. There is no justification for vindictiveness, and, under the facts, no need for tempting Aulus by disproportionate property recovery to forego any temptation to self-help. Yet the conduct of Numerius has been wrongful, and this element cannot be disregarded. Accordingly it was made profitable to Numerius to effect a settlement. He might offer adequate compensation—which was a matter not difficult to estimate—and the suit was over. If he let it come to an action, and lost, he paid double.

Again the victim was allowed a little more than strict compensation. Commodities shift in value, and he could claim, not the demonstrable value the *res* had at the moment of the injury, but the highest value it had had during some period before the injury—one year, if it was destroyed; thirty days, if it was merely damaged.<sup>35</sup> No doubt this was instituted to make the way of the transgressor a little harder, but in practice the value mentioned may not have been so different from strict compensation. It must often have been the case that the only evidence of the value of the *res* was derived from some valuation placed upon it within the year or within the month; and it might well have been argued that a particular value reached, even for a brief time within so short a period, might easily have been reached again if the *res* had not been destroyed.

<sup>34</sup> D. 9, 2, 5, 3.

<sup>35</sup> I. 4, 3, 9; D. 9, 2, 23, 3.

The second circumstance was the nature of the wrongful act. It was rarely malicious—for in that case the *actio iniuriarum* would generally lie—but it was often negligent, and in it we first meet the concept of *culpa, improvidentia*, lack of that caution and circumspection which it behooves men, as social beings, to have.

This term was as difficult to Romans as it is to us. To define it is obviously a hopeless task. It implies a certain standard of conduct, and the reason that the search for such a standard was bound to be futile is due to the fact that the standard is based, in part, on the necessarily unique facts of the incident which it attempted to regulate.

But if no fixed standard could be found, situations could be classified. A slave passing a certain place is accidentally wounded by a javelin thrown by some young man who is practicing this exercise. If the place was one where military exercise was common, there was no *culpa*. Again, there was none if in a solitary spot, where casual passengers did not go. Otherwise, there was *culpa*.<sup>36</sup>

But in such cases it was merely a presumption of *culpa*, or lack of it, that arose, and the presumption does not even seem to have been conclusive. Indeed, conclusive presumptions of negligence really negative the idea of negligence altogether, and the obligation arising in this way is rather to be classed as quasi delict, liability without fault, than delict proper.

The statute—an old one, it will be remembered—provided that the damage must be done *corpore corpori*, by the physical contact of the wrongdoer's body with the thing he injured. This is the sort of provision which is quite what one should expect in an ancient law, in which the particular things that gave occasion for the law seem the only things worth legislating about. If the rule *corpore corpori* had been strictly followed, the *lex Aquilia* would have had but a limited application; but it was supplemented so early, and so easily, that it

<sup>36</sup> I. 4, 3, 4; D. 9, 2, 9, 4.

was good-humoredly retained because there was no point in changing it.<sup>37</sup>

Two classes of cases were distinguished. The first was the constantly increasing group of cases in which there was no physical contact between the wrongdoer and the damaged *res*, but in which some intermediate object or device was used to effect the damage. Ælius cuts the rope by which a boat is moored. He shouts and scares cattle down a cliff. The prætor allowed an action which was called *in factum ad exemplum legis Aquiliæ*; that is to say, the demonstration, instead of mentioning the statute and using its words, described the injury particularly without such mention. Indeed, this was regularly done in the ordinary *actio iniuriarum*.

The term *utilis actio*, "Aquilian action on the case," was not used for these situations, because that name had come to be specially applied to the second of the two classes mentioned above. The latter was a somewhat miscellaneous one, and included all cases in which, for some particular and accidental reason, it could not strictly be said that the tort-feasor had done damage to the property of another. The following examples will illustrate the *utilis actio legis Aquiliæ*:<sup>38</sup>

(1) Ælius has, by culpable mistake, eaten or drunk Mævius' food. It could hardly be maintained that the food was damaged by being used in the only way in which it could be used.<sup>39</sup>

(2) Ælius negligently struck and injured Mævius. Mævius did not own his body, and an injury to it was therefore not an injury to property.<sup>40</sup>

(3) Ælius negligently injured or killed Marcus, a *filius-familias*, and thus deprived the latter's father of the young man's services. The father had the *utilis actio*, because he did not own his son.<sup>41</sup>

<sup>37</sup> I. 4, 3, 16.

<sup>38</sup> D. 19, 5, 11; 9, 2, 53.

<sup>39</sup> D. 9, 2, 30, 2.

<sup>40</sup> D. 9, 2, 13, pr.

<sup>41</sup> D. 9, 2, 13, pr.; 9, 2, 7, pr.



(4) Mævius, hired by Ælius as watchman, slept at his post, and because of that fact Ælius' house burned down. Mævius had literally done nothing, and had certainly not touched the house.<sup>42</sup>

### CONTRIBUTORY NEGLIGENCE

50. A number of instances are given in the Digest of cases in which the Aquilian action will not lie because of negligence of the plaintiff. In most of them, there is a concurrence of *culpa* on the part of plaintiff and defendant.

The severe test mentioned in the sources would bar any action, if the plaintiff's diligence might have avoided injury.

In all likelihood, the classification of actionable and nonactionable situations was based on practical considerations.

The question of contributory negligence is of first-rate importance in modern law in all matters of tort liability. The general rule of the common law is that the mere fact of contributory negligence, however slight, bars an action even against an admitted tort-feasor. This has been regarded as a hard rule, and numerous attempts have been made to relieve its incidence, especially where gross or wanton neglect on one side was matched by slight oversight on the other. But in general the common law has held to the principle that courts could not undertake to apportion responsibility, and that, if both parties were at fault, even in different degrees, it would let the loss lie where it fell.

The Roman law on the subject is difficult to ascertain. It is obvious that the matter could not possibly have the importance it possesses in our law—an importance due chiefly to the conditions of modern transportation and industry. It will be re-

<sup>42</sup> D. 9, 2, 27, 9.

membered that the question was scarcely an acute one in Europe and America until the middle of the nineteenth century.

It has frequently been stated that the rule of the Roman law on the subject is the same as that of the common law. This is chiefly based on a passage quoted from the last title of the Digest—which is entitled “A Collection of Ancient Maxims.” The maxim in question, however, is a mere general assertion of the principle of *damnum absque iniuria*, the principle that one may not recover for damages caused by one’s own fault.<sup>43</sup>

A typical example is furnished in Paul’s Sentences (i, 15, 3) (cf. *supra*, § 31), where it is held that, if one irritates an animal and is bitten or otherwise injured, there is no action against the animal’s master or guardian. Another instance (D. 9, 2, 31) is the case of a slave who permits himself to be shaved in a place where he is in obvious danger from passing missiles. Common-law courts might speak of “assuming a risk” in instances of this sort. Plainly they are cases in which the fault is wholly on the side of the injured person.

There are a few cases in the Digest which may be considered in this connection:

(1) A slave crosses a field in which several persons are engaged in throwing javelins at a mark. He is accidentally wounded by one of the javelins. His master has no cause of action.<sup>44</sup>

(2) A slave is unlawfully wounded or beaten by a stranger, but is so carelessly tended by his master that he dies. There is an action based upon the wounding, but not upon the death.<sup>45</sup>

(3) A slave is beaten severely by a stranger, and is put by his master into the hands of an unskillful physician. He dies from the result of the blows, but could have been saved by skillful attendance. There is no cause of action for the slave’s death.<sup>46</sup>

<sup>43</sup> D. 50, 17, 203.

<sup>44</sup> I. 4, 3, 3; 4, 3, 4.

<sup>45</sup> D. 9, 2, 30, 4.

<sup>46</sup> D. 1, 18, 6, 7.

(4) A man prepares pits for trapping stags and bears in the public way. A traveler, who is warned of their existence, uses no care, and falls into one and is injured. He has no cause of action.<sup>47</sup>

(5) A tree trimmer lets a branch fall over a high road and gives a warning cry. A passer-by negligently disregards the warning and is injured. He has no action.<sup>48</sup>

These will illustrate the attitude of Roman jurists on this question. It is expressly stated that instances like this are frequent, and as early as the time of Quintus Mucius (*supra*, § 24) the general rule is laid down that it is always *culpa* on the part of the injured person, if he could by due diligence have avoided the injury. That will cover all the instances cited, and is certainly very close to the Anglo-American method of dealing with such situations.

There is no technical term for "contributory negligence," at Roman law. In the modern German civil law the term *culpa compensatio*—i. e., set-off of negligence—was devised. It is admittedly inaccurate, but not more so than the expression "contributory negligence" itself. Many European and English writers have preferred to treat the question as an aspect of the principle of legal causality. What act really caused the injury, that of the tort-feasor, or that of the injured person? At Roman and at English law, courts were inclined to say the latter. Yet it is as arbitrary to select the last act of a series as the first, or any intermediate act, and, indeed, it can be argued that the concurrence of other wholly external circumstances was as essential to the injury as the negligence of either person in the controversy. What both the Roman and the English rule is based on is a vague feeling that a strict standard of diligence in our ordinary affairs is desirable.

The Roman rule was qualified by the fact that an extreme disregard for the safety of others could always be classed as

<sup>47</sup> I. 4, 3, 5.

<sup>48</sup> D. 9, 2, 28.

*dolus*, and the harshness of the English rule has been met by legislation and special doctrines, such as that of the "last clear chance."

## THE GENERALIZATION OF THE AQUILIAN ACTION

51. The Aquilian action and its extensions became a general tort action. Since most torts were in later Europe treated primarily as crimes, the Aquilian action was principally used in the case of negligence.

Whatever may have been its original purpose, by construction the *lex Aquilia* filled most of the gaps left by the action of *furtum*, the trespass to property, and the *actio iniuriarum*, the trespass to the person. It covered the cases in which there was no malice, and in which therefore *iniuriæ* would not lie; or no profit, in which *furtum* would not lie. It also dealt with trespass to realty, for which *furtum* was quite inapplicable, and with those many instances of nuisance which are not predicated upon malice at all. Likewise, most examples of waste could be sued upon in this way. And, finally, it was particularly available in that large and indefinite group of delicts which we classify as negligence.

It is not surprising, therefore, that the action on the *lex Aquilia* should have become in later European law the generalized tort action, which took the place of all nominate torts, since every one of them was based on a wrongful act, and resulted in damage to property or person. This result was hastened by the fact that the public character of certain wrongs and the overshadowing power of royal tribunals rarely permitted the choice of public or private redress to lie with the person injured.

The governmental officials undertook to repress crimes, and their inquisitorial functions made it possible for them to combine compensation of injury with punishment of the offender. In general, there was an election permitted at Roman law between

the criminal and civil remedies; but, in some instances, no election was permitted, and the criminal remedy was insisted upon, which of itself barred the civil penalty. That became a rule in later Europe, and in the countries whose systems are based on the Roman law we find the damages for a wrong, which is also punishable as a crime, dealt with as a matter for criminal courts.

When the tort—as in most cases of negligence—does not amount to a crime, the modern Codes of Continental Europe have a general provision that has carried over much of the *lex Aquilia*, and especially the requirement that actual fault, deliberate or negligent, must be shown. That was deemed a fundamental basis for recovery until the conditions of modern industry forced a re-examination of the entire question.

### MISCELLANEOUS DELICTS

52. (1) Corruption of slaves, with the result that their loyalty was impaired.
- (2) Fraud on creditors.—The Paulian action was allowed against any debtor who had stripped himself of property to avoid paying debts, and also against *mala fide* purchasers. It was extended as a quasi contractual claim against *bona fide* purchasers.
- (3) Misfeasance of a *iudex*.—A *iudex* who negligently or willfully gave a wrong decision was liable in the action, *si iudex litem suam fecerit*.
- (4) Malicious prosecution—*Calumnia*.—A malicious suit, civil or criminal, was the basis of a tort claim.
- (5) *Dolus*.—Any willful wrong, especially fraud, allowed restitution, and also, if no other action was available, a special action of *dolus*. The penalty was in the alternative, either restitution or an indefinitely taxed penalty.



- (6) Duress—*Quod metus causa*.—Duress was not only a defense, but the basis of a tort action with four-fold penalty. This could be avoided by restitution.

The action, which was called an action *in factum ad exemplum legis Aquiliæ* (supra, § 49), covered, it might well seem, any special case which could not be brought under the exact wording of the law. But there were certain situations which were deemed—perhaps because of some accidental circumstance—to be of a character so individual that they could not be classed even in this elastic category.

(1) *Servi corrupti*.—Tampering with a slave in such a way as to make him less valuable to his master—especially if it impaired his loyalty—was a wrong which the prætor's edict had long made actionable. The penalty was double the damage caused—that being doubtless measured by the difference in the salability of the corrupted slave. It was based on *dolus*, deliberate wrong, and therefore did not lie if the impulsion was mischief or carelessness. In that case the Aquilian action apparently did lie, if damage resulted to the slave.<sup>49</sup>

(2) *Fraus creditorum*.—When servitude for debt was practically abolished, and a general assignment relieved men from the danger of body execution, the prejudice suffered by the insolvent's creditor's occupied the prætor's attention. The matter was connected with a violent political and economic agitation in the early centuries of Rome, and the passions of the conflict were not to be lightly renewed. Against an unfortunate debtor, public opinion would not have tolerated rigor; but against one who deliberately refused to pay his creditor, or by trickery defrauded him, a *decoctor*, there was little reason for indulgence. A suit was permitted—called the Paulian action—against any debtor who had deliberately stripped himself of his property while insolvent, and also against a *mala fide* purchaser from such a debtor, who was treated as accessory to the fraud. *Bona fide* purchasers,

<sup>49</sup> D. 11, 3, 1, pr.; 4, 5, 2; I. 4, 1, 8.

donees, and heirs were liable on it, but not delictually, merely to the extent of their enrichment, which made it in effect a quasi contractual remedy in their case. <sup>50</sup>

It was not necessary to make a fraudulent conveyance in order to incur liability under the *actio Pauliana*. Any impoverishment was enough. A voluntary abandonment of property, a surrender of securities, the assumption of an unnecessary obligation, even the deliberate sacrifice of an easement by nonuser—if the necessary conditions of insolvency and reckless disregard of creditors' rights were present—was sufficient to base the Paulian action. But mere omission of an opportunity for enrichment was not enough, and the payment of a just debt was equally no ground for suit. We may say accordingly that a preference, however deliberate, unless it was merely colorable and simply a device to remove property out of the hands of creditors altogether, was something which the Roman law did not treat as a wrong.

The Paulian action was a tort action, but its delictual character was indicated solely by the fact that it was not available against the wrongdoer's heir. The only penal element lay in the fact that it was an *actio arbitraria*. The *iudex* was empowered to assess the damage at an arbitrary sum, unless the property was restored. A certain pressure was thus placed upon the defendant.

(3) *Si iudex litem suam fecerit*.—The *iudex*, being a private citizen, could not hide behind his public function, if he was negligent or corrupt. Indeed, even magistrates were accountable for misfeasance in office; but such misfeasance was obviously a public wrong, and was punished by criminal procedure. The very earliest of the *quæstiones* dealt with the matter of impeaching a magistrate. A *iudex*, on the contrary, injured only a litigant if he was incompetent or malicious, and the litigant had an action of very ancient standing since it was couched in the archaic phrase just mentioned. It implied in its terms that the *iudex* had entered into a sort of conspiracy with the successful litigant; but, if

<sup>50</sup> D. 42, 8.

this was insisted upon, it was an obvious fiction, since he was as liable for mere carelessness as for deliberately perverting justice.

We do not hear that it was resorted to frequently, but doubtless the possibility that it might be tended to encourage the practice of relying on *responsa* of eminent counsel, and, after Augustus, of licensed counsel. In form, it might seem to permit of indefinite prolongation of litigation, since a defeated party might sue the *iudex*, and, if defeated in this suit, he might sue the *iudex* who decided against him. Yet malicious prosecution rendered a man liable to an *actio iniuriarum*, and there was also a criminal penalty for reckless litigation.

The delict "*si iudex litem suam fecerit*" is classed in Justinian's Institutes as a quasi tort rather than a tort proper. This is declared to be due to the fact that he is liable even without deliberately wrongful intention. Since, however, he would be liable in the case of willful as well as negligent wrong, it seems better to place this among the specially named delicts.<sup>51</sup>

(4) *Actio calumniæ*.—The common-law offense of champerty consisted in receiving consideration for supporting another person's suit, either as plaintiff or defendant. A very similar offense at Rome was the action of *calumniæ*, which allowed fourfold damages if brought within a year, and simple damages if brought thereafter. In the older procedure the plaintiff could be compelled to offer an oath that he was not guilty of *calumniæ* in certain cases; and in the later procedure both parties had to take such an oath as a matter of course, the *calumniæ* being in this case any *mala fide* prosecution, and not merely champerty proper.<sup>52</sup>

(5) *Dolus*.—Whenever the Romans attempted a definition of *dolus*, they emphasized the element of deceit, but in its practical application it was much wider. It included anything done of set purpose, from which harm resulted to another. The purpose may not have been to cause the harm, but merely to do the act. To

<sup>51</sup> I. 4, 5, pr.; D. 1, 13, 6.

<sup>52</sup> G. 4, 174 et seq.; I. 4, 16, 1; D. 3, 2, 1, pr.

this was added a wanton recklessness of the consequences of one's acts, to which one might properly ascribe a willingness that harm should result.

In all such cases, the injured person was entitled to restitution. It might sometimes be obtained by a *restitutio in integrum*, when he had parted with value because of the *dolus*. The case might fall under the head of one or the other of the torts already described, in which he could often obtain both restitution and a penalty. There might be contractual remedies available of various kinds. In all such cases the action of *dolus* would not lie, provided the judgment in these cases was not made illusory by the insolvency of the defendant.

If no one of these actions was available, there was reasonable doubt on the matter; or, if the defendant was insolvent, he might be sued for the *dolus*. The action was *arbitraria* (supra, § 22). The *iudex* was directed to condemn the defendant to a penal sum, unless he offered to make restitution. This pressure would have the effect of inducing even an insolvent to get the money together, in order to avoid the much larger penal sum which would be imposed. It must be remembered that there was no discharge in bankruptcy, and subsequent acquisitions would be subject to execution. Secondly, the person condemned for *dolus* suffered *infamia* (supra, § 47), which was not the case in most of the alternative remedies.<sup>53</sup>

How strictly the purpose of restitution was maintained may be seen from the following. As in most tort actions, if several persons had been engaged in the wrong, the *actio doli* was available against all of them; but, if one paid, it could not be maintained against the others. That would not have been the case in *furtum*.<sup>54</sup>

In some cases, the harm done was simply that the injured person incurred an obligation. There was nothing to restore in this case, because nothing tangible had been lost, and the

<sup>53</sup> D. 4, 3, 1, 2; 4, 3, 1, 8.

<sup>54</sup> D. 4, 3, 17, pr.

obligation was practically discharged by giving the obligor the exception of *dolus*. The exception of *dolus* could also be used by way of replication, to meet what would otherwise have been an absolute bar to an action.

It further took the place of the general defense of fraud in our system, and performed its multifarious functions. If we remember that equity, according to the established maxim, is the particular enemy of fraud, and that Roman equity was amalgamated in procedure with Roman law at an earlier stage than in the common-law system, we shall more readily see how far-reaching the use of the *exceptio doli* might become. Any claim, however formally based, might be rejected as unconscionable, precisely as in all equitable actions it is a defense to prove the impropriety of the defendant's conduct in securing his claim, or its oppressive incidence, if enforced.

(6) *Quod metus causa*.—We think of duress as a defense—as a reason for not enforcing a claim created by means of it or at best for recovering what had actually been transferred under such illegitimate pressure. The Romans had the same view of it, but they treated the restoration in a broader way. Duress was a ground for *restitutio in integrum*, for an attempt at recreating the situation which had been disturbed. Any prejudice suffered was consequently a ground of action, and, as in the case of *dolus*, pressure was placed upon the defendant by making the action an arbitrary one. The defendant was condemned to fourfold the damage caused. The fact that it was fourfold, and not an indefinite penalty, supported by the oath of the plaintiff, indicates, perhaps, a slightly greater antiquity for this action than for *dolus*.<sup>55</sup>

The purpose of the action is further emphasized by the fact that a quasi contractual claim was created, against third persons who profited by the acts done under duress, to the extent of their enrichment. Their *bona fides* did not protect them, as it often failed to do at Roman law; but, as in the case of

<sup>55</sup> D. 4, 2, 14, 1.



the wrongdoer, they could always avoid condemnation by restoring whatever they had gained. But, if they had given value for what they had obtained, especially if they had bought it, they could probably demand restitution on their side before delivering it to the former owner.

As to the nature of the duress itself, two things are to be noted. The standard was an objective and a strict one. Not every light terror was sufficient to base the claim. It must be the well-founded fear that even a firm and reasonable man would entertain, and it must be directed to his person or to his family, not to his goods. At any rate, the mere fear of pecuniary loss was not enough, although the threat of setting fire to one's house might be a different matter.

Again, the enforcement of a right was no duress, however hard. Nor was the threat of a legitimate punishment duress. A thief or an adulterer, taken *flagrante delicto*, might under fear of death have purchased immunity by a transfer or a promise. Both were invalid as extorted by duress, since the killing of such evil doers was permitted only under exceptional circumstances. But, if these exceptional circumstances existed, it would seem that the transaction would be enforced.

### QUASI DELICTS

53. Quasi delictual obligations were based on vicarious or imputed liability.

- (a) *De deiectionis et effusionis*.—The owner or legal occupant of a building or an apartment was liable for any damage done to persons by things thrown from the apartment. In this connection actions for wrongful death were expressly allowed.
- (b) Carriers and Innkeepers were liable for thefts or injuries committed by their employees.

The generalized tort action, based on the *actio legis Aquilæ*, seemed to have found a final form in the statement of the French Civil Code that every wrongful act imported an obli-

gation to repair the damage caused by the wrong. The term used was "fault"—"*faute*"—and it could hardly have been supposed that anything short of culpability could create such an obligation in morals or at law.

But then, and earlier, the principle of imputed wrong was known and enforced. That a master was liable for his servants' wrongs, and a father for those of his children, became an important provision of the Civil Code. This was a conscious departure from the Roman law. The Roman law, it may be said, admitted the doctrine only in a limited sense. Fathers and masters in the very early law could rid themselves of liability for the delicts of their dependents by noxal deduction (*supra*, §§ 38, 39). And in the later period, a *filius-familias* was exclusively liable for his own torts.<sup>56</sup>

But there was a type of imputed liability that underwent a special development at Roman law. If anything was poured out of a window or thrown out from any height on a public road, the owner or lessee of the apartment from which the act took place was responsible for any bodily injury to passers-by caused thereby. It made no difference how completely the owner was innocent of wrongful acts in the matter, or how much care he had exercised to prevent such occurrences. The liability was absolute.

Since there was an injury done, but no delinquency on the part of the person sued, the Institutes of Justinian stated that the obligation was *quasi ex maleficio* (*quasi ex delicto*), and the term quasi delict will describe the situation very well.

It was not necessary that the road should actually be a public highway, if as a matter of fact it was generally used as such. Nor did it matter that the occupant of the room or building was merely a gratuitous tenant at will, provided he did as a matter of fact live there. But it mattered very much that he lived there, and was not a mere guest of the occupant.

The damage was originally penal, being double the loss suf-

<sup>56</sup> I. 4, 8, 7.

ferred; but under the Institutes it became compensatory solely. And in estimating it the methods of calculation employed have quite a modern ring. The injured person is to have the expenses incurred for medical attendance, the actual loss of earnings, and the prospective loss of earnings if he has been permanently disabled in whole or in part. But he could not recover damages for disfigurement, which did not interfere with his earning capacity, however much he suffered under it. The reason assigned is that the body of a free man cannot be subject to valuation—a phrase wholly misunderstood, if it is taken to mean that computable damages caused by bodily injuries could not be recovered at Roman law.<sup>57</sup>

If the passer-by was killed, however, the phrase just quoted was used, somewhat improperly, to prevent estimation of damages on the basis found so simple in the case of injury. The reason was probably procedural. In the case of the quasi delict, as in delictual actions generally, a right of action, once accrued, survived in favor of the injured person's heirs, but could not be brought against the heirs of the wrongdoer. There is really no basis at all in Roman law for the much-abused maxim, "*Actio personalis moritur cum persona*." But when the person was killed outright it could be said that no cause of action ever accrued, and there was nothing to survive.

None the less—and at a relatively early time—a fixed sum was allowed as a penalty in case of death caused by the quasi delict under discussion. It was finally fixed at 50 *aurei*—a sum about equivalent to \$2,500 in gold, and in purchasing power worth many times that. It was accordingly a substantial amount, and must often have far exceeded the mere pecuniary loss occasioned.

The procedural difficulty was solved by making these actions "popular." By this term it was provided that any person might bring the action, just as at the common law in the case of public nuisances. But the court will prefer as plaintiff any one who

<sup>57</sup> I. 4, 5, 1; D. 9, 3.

has suffered by the injury, and doubtless, in the case of death, a relative of the person injured.<sup>58</sup>

Actions for death, which, we may remember, were unknown to the common law until Lord Campbell's Act in 1846, were accordingly in the special case of this quasi delict maintainable at the Roman law. But there is little warrant for generalizing the action, and asserting that death by any wrongful act was the basis of recovery. Perhaps, in these cases, since criminal proceedings were available, the satisfaction of the vindictive feelings of the survivors was deemed enough. In general, as we shall see, criminal and civil penalties for wrongs were alternative, and not cumulative.

None the less, actions for wrongful death—murder particularly—were fairly common throughout all Europe in the period of the later civil law, and while the authority in the *Corpus Iuris* for them was concededly inadequate, they were really taken as a matter of course. The compensation sought for was based on the loss occasioned, and was not a fixed penalty, and the action lay in favor of the survivors.

Another quasi delict concerned a special class—carriers by sea, innkeepers and stable keepers. These, as we shall see, were held to a much greater liability than ordinary hirers or depositaries on their contracts of bailment (*infra*, § 94). They were further liable in quasi delict for any loss or injury occasioned by the negligence or willful wrong of their employees. The reason assigned in the *Institutes* is that so frequently suggested in modern discussions, the fact they have been guilty of negligence in employing persons of this character. The reason is obviously insufficient, since the defendants could not clear themselves by showing the utmost care in the selection of their servants. It is a clear case of an obligation imposed without any reference to actual fault, in the interests of public policy.<sup>59</sup>

<sup>58</sup> D. 9, 3, 5, 13; 9, 3, 5, 5.

<sup>59</sup> I. 4, 5, 3; D. 47, 5; 44, 7, 5, 6.

The action was for double the loss caused. The owner of the injured property had his election between proceeding against wrongdoer in *furtum*, or under the *lex Aquilia*, and suing the innkeeper or shipmaster. But if the goods had been intrusted to the care of the latter, so that they were absolutely liable for them, the owner had no action of *furtum* against the actual thief, and only the bailees had such an action.

A sailor had no such action against the master of the ship for an injury caused by a fellow sailor.<sup>60</sup> We have in this instance a special case of the "fellow servant" doctrine, which had so eventful a history at the common law.

<sup>60</sup> D. 4, 9, 7, 2.



## CHAPTER 6

## THE FORMAL CONTRACT OR STIPULATION

## Section

- 54. The Stipulation.
- 55. Actions on a Stipulation.
- 56. Nature of Relief Demanded.
- 57. Prætorian Stipulations and Special Rules.
- 58. Consensus.
- 59. Invalid Contracts.

## THE STIPULATION

54. The original idea of obligation was a self-binding by means of spoken words. This resulted in a stipulation, a sequence of question and answer. The questioner was the stipulator; the answerer, the promisor.

The form was simplified, until any memorandum of an agreement carried with it an almost conclusive presumption that a stipulation had been made.

The obligation created by delict is of extremely ancient origin. An injured person takes means to redress his wrong by his own efforts. The *iudex*—in this case, the ancient magistrate himself (cf. supra, § 44)—first ratifies his conduct, then assists him, then substitutes his form of redress for the act of the claimant. In all cases, therefore, the *iudex* declares a certain course of action performed or to be performed, as *iure factum*, “done rightfully,” because it is the appropriate and deserved penalty or another action, which was *non iure factum* or *iniuria factum*, “wrongfully done.”

The obligation to pay the penalty was created entirely by the *iudex*'s determination. It certainly did not exist at the time of the wrongful act. The penalty varied, as we have seen, and in the large class of delicts actionable under the *lex Aquilia*

it was made as nearly as possible the equivalent of the damage done.

But it has been pointed out before that the idea of obligation did not arise in this way (*supra*, § 42). The term was used of the delict obligation, because its enforcement was in fact attempted in the same way as that of the obligation proper. The characteristic of the latter was that the obligor bound himself—*se obligare* is the usual expression—by the use of some word or the performance of some rite, although the binding, like all such rituals, required the co-operation of at least two persons.

That in ancient times particular words in a special sequence effected this binding we know. If A. desired certain action on the part of N., and closed his proposal with the word "*spondesne?*" Do you so promise? and if N. answered, "*spondeo,*" I promise, N. at once became obligated to A. It is likely that the form was originally more complicated, and involved a ritual of action; but as far as we can trace it clearly the stipulation had no other requirement than this succession of question and answer and the employment of the particular word *spondeo*.<sup>1</sup> The putting of the question was called "stipulation," and the giving of the answer was called "promise." And the entire transaction was generally known by the former name, probably because only the stipulator could sue upon it.

There was a still older—or at any rate equally old—way in which a man was tied up to another, the *nexum* and *mancipium*. In this case we can with some probability restore the ritual. It involved a balance, a piece of unminted bronze, an official weigher, and at least five witnesses. The person performing the *nexum* or *mancipium* pronounced a formal sentence, and the result of his act and his utterance was a change in the relation between him and another person present at the same time.<sup>2</sup>

<sup>1</sup> I. 3, 15, 1; D. 45, 1, 1, 6; C. 8, 37, 10; G. 3, 93. Isidorus, Origines, 5, 24, 30. Cf. Kniep's Gaius, 5, p. 90 et seq.

<sup>2</sup> De Zulueta, 29 Law Review Quarterly, 137; Girard, Manuel, p. 487 et seq.; Buckland, Text-Book, p. 426 et seq.

A much discussed, and, I think, much misunderstood, provision of the Twelve Tables, recognizes the validity of the change effected, the *ius* created, by this form, and lays stress on the fact that the measure of the *ius* is to be found in the words used, and is not to flow from the mere act itself.<sup>3</sup>

Among the uses of the ritual were two important ones. Men transferred ownership in this way and made a will, and for these purposes it was continued almost up to Justinian's time. Another use was in connection with the *nexum*. We can say little about this, because our information is confused and uncertain, but we know that it resulted in some classes of debtors becoming *nexi*—"bound"—which seems to have been a sort of debt servitude.

The stipulation was perhaps every bit as old as the *nexum*. And when, as a result of the social upheavals in the early stages of Roman history, and of the engrossment of the governing classes in foreign expansion, the *nexum* died out, the stipulation remained as one of the principal forms of effecting the binding of one person to another, the obligation.

At a very early date the use of the particular word *spondere* is no longer essential. The ordinary word for promise, *promittere*, is allowed as an alternative, and soon any word or any expression may take its place. But for a long time the use of question and answer was vital, and, unless there had been this sequence, no obligation at all arose.

In the last periods of Roman legal history, however, (*supra*, § 6), oriental influences dislodged even this characteristically Roman institution, and a written memorandum of the transaction, officially attested, was allowed to have the same efficacy as the oral stipulation. Indeed, it seems to have displaced it in practice.<sup>4</sup>

But the written document was never quite the equivalent. The Institutes expressly provide that the document shall mere-

<sup>3</sup> *Cum nexum faciet mancipiumque uti lingua nuncupassit ita ius esto.* Festus, *s. v. nuncupata*. Cicero, *De Or.* 1, 57.

<sup>4</sup> I. 3, 21; C. 4, 30.

ly be considered conclusive evidence that a stipulation has been entered into, unless it were shown *aliunde* that the parties were not in the same city for the whole day represented by the date of the memorandum. In that case there was no contract. Similarly, if either or both were deaf mutes, no evidence of a stipulation could possibly be entertained.<sup>5</sup>

The efficacy of the words and of the sequence impressed itself deeply in the minds of men, and the sentence, "Thus N. promised to A.'s stipulation," became in Latin and in Greek translation a formal seal, which was added to a great many documents, often those that did not need it at all, and those in which it made no sense whatever.<sup>6</sup>

In later Europe, the requirement of a formal stipulation was deemed to be a piece of Roman severity, and under the influence of the Church simple agreement was held to be as good a bond. Yet the Roman form is not a complicated one, and is much less rigid than the sealed contract—the covenant—of the common law. It could even be defended as an important safeguard against incautious expressions, since the give and take of discussion could be freely entered into, and neither side would be surprised into an obligation. The requirement that a man's assent should be challenged before it bound him would make him aware at what moment he was binding himself to do a particular thing.

At the same time, this justification of the formal stipulation must not be taken to be a statement of its historical origin. It arose just as the English covenant did—also called *obligatio*, or bond, we may remember—out of the feeling that certain particular words or acts, and those only, could perform this curious function of limiting a man's freedom so effectively that magisterial pressure would be brought to bear upon him in order to enforce the limitation.

<sup>5</sup> I. 3, 19, 7; 3, 19, 12.

<sup>6</sup> Paul Meyer, *Juristische Papyri*. I. 3, 19, 17; D. 2, 14, 7, 12.

## ACTIONS ON A STIPULATION

55. (1) *Condictio certi* (*certæ pecuniæ creditæ*) was the suit for a liquidated sum of money promised.

If the claim was excessive, the entire debt was forfeited, unless a *restitutio in integrum* was available.

(2) *Condictio triticaria* was the suit for a specific *res*, or a specific quantity of some commodity.

(3) *Actio ex stipulatu* was the suit when some unliquidated type of performance was promised.

There were three possible actions to enforce a stipulation—the *condictio certi*, the *condictio triticaria*, and the *actio ex stipulatu*.

The *condictio* was the ordinary name for an action which, while it resulted only in a personal judgment, was intended to secure a specific *res*, or a specific type of *res*. The *condictio certi* is properly the *condictio certæ pecuniæ creditæ*, the action for a fixed and liquidated sum of money owed to the stipulator by the promisor.<sup>7</sup>

The *iudex* in such an action must give the plaintiff what he asks for or nothing. If the plaintiff has asked for less than he is entitled to (*minus petitio*), later practice permitted him to sue for the balance. But, if he has asked for more than he is entitled to (*plus petitio*), he will lose his suit, and, since the matter is now *res adjudicata*, he will not be able to bring the action again.

It is true that, if the *plus petitio* was due to an excusable mistake, the plaintiff might obtain equitable relief by means of a *restitutio in integrum*.

A *plus petitio* existed if the debt was not yet due, or the per-

<sup>7</sup> Buckland, Text-Book, p. 676 et seq. The terminology of the texts is very much confused, and interpolations are freely suggested by modern critics. It is very hard to see the difference in many cases between circumstances which allow the *condictio certæ rei* and the *actio ex stipulatu*. D. 45, 1, 1, 1; 46, 4, 21; 4, 8, 31; 35, 2, 15, 1; 2, 10, 1, 3.



formance due at a place different from that at which it was demanded. In the latter case, relief might be offered to the stipulator when the proper place of performance, for one reason or another, was not available to him. He could sue the promisor where he found him, in an adapted action in which the stipulated place of performance was made irrelevant.<sup>8</sup>

The *condictio triticaria* was properly applied to a suit on a stipulation in which the promisor had promised to deliver a specified quantity of a named commodity. *Triticum*, "wheat," being a common subject of such contracts, gave the name to all of them. It covered, however, contracts in which a specific *res* had been promised, such as a slave, indicated by name, a definite piece of land, and the like.

The *actio ex stipulatu* was available in stipulations in which the promisor undertook to do some act or make some performance which was not put at the time in liquidated form. The *iudex* was instructed to give the stipulator, if he found in his favor, the value of the performance on which default had been made. But it was the real value, and not merely any relief which in equity a plaintiff might have been entitled to ask.<sup>9</sup>

## NATURE OF RELIEF DEMANDED

56. The relief demanded is essentially specific performance, but condemnation was enforced only by an ordinary judgment, not by imprisonment.

The action involved a *iudicium stricti iuris*, a "procedure of strict law," in which the *iudex* was strictly limited by the instructions of the magistrate.

A man bound himself by answering the stipulator. He freed himself by doing what he had promised. Technically speaking, he cut the bond, *solvere obligationem*.<sup>10</sup> He could free himself

<sup>8</sup> Consultatio, 5, 7; I. 4, 6, 33; D. 13, 4; 4, 6, 1, 1.

<sup>9</sup> D. 12, 1, 24.

<sup>10</sup> D. 42, 1, 4, 7; I. 3, 30, 1.

in no other way, and the *index*, if he found a stipulation to exist, would attempt to force him to free himself in that way. He "condemned" him to do so, and in many instances to be a "*condemnatus*," a condemned man, even in a civil suit, was a serious matter.<sup>11</sup> In many other instances, however, "condemnation" was no more than an emphatic bidding to do a certain thing.

We may here indicate an important difference between the Roman and the English point of view. At the common law a contract creates an obligation, which is measured by the terms of the promise, just as at Roman law. The promisor "owes" the promisee the precise performance he has agreed to.

But, if he fails to do so, in most cases a wholly different obligation arises, which takes the place of the older one. The promisor no longer owes the promisee precise performance, but he owes him a sum of money as "damages" for not having performed. The old obligation has been transmuted into a new one—often a very different one. This transmutation Mr. Hohfeld has emphasized by calling the original one "primary" and its successor "secondary."<sup>12</sup> Often the secondary ones are very much like the primary ones. They are never quite the same, if only because they are performable at different times; but, in those limited transactions for which a suit in "specific performance" will lie, what A. can demand of N. in an action and what N. promised A. he would do are very nearly identical.

At the Roman law this was regularly the case.\* If N. had promised by way of stipulation, A. could ask the *index* to condemn him to give a particular thing, without the alternative of money compensation. It is therefore partly accurate to say that, in the oldest as in the latest stages of Roman law, an action for specific performance would lie. But it is true only with an important qualification. What seems most characteristic of a judgment in specific performance in our procedure is not the wording of the judgment, but the drastic way in which it is en-

<sup>11</sup> D. 43, 16, 6, 15, 3, 16; 46, 1, 45.

<sup>12</sup> Fundamental Legal Conceptions, 23 Yale Law J. 16 et seq.

\* Cf. G. 4, 48, with I. 4, 6, 32. D. 42, 1, 13, 1.

forced—by imprisonment for contempt or by seizure of the property concerned. No such means were available to a Roman litigant. Apparently all that he got was the power of executing the judgment, as any other judgment would be executed, against the general property of the defendant or against his person, subject to the many limitations on the effectiveness of this kind of execution (cf. *supra*, § 21).

That a judgment in specific performance was available to a stipulator was due to another circumstance intimately connected with Roman procedure. In both the *legis actio* and the *formula*, the duty of the magistrate was to constitute a *iudicium* (cf. *supra*, § 11); i. e., to appoint a *iudex*. The instruction which he must give the *iudex* was limited. If the latter found that the defendant had formally promised in reply to the question, he must condemn him. The narrow bounds within which the *iudex* must act were indicated by calling this a *iudicium strictum*—later, a *iudicium stricti iuris*—which was contrasted with the *arbitrium*, the *iudicium* in which the *iudex* was permitted to assess the judgment in the way he deemed best. When the difference between proceedings in *iure* and *in iudicio* was obliterated in the cognition procedure (cf. *supra*, § 32), the entire action was called an *actio stricti iuris*.<sup>13</sup>

The *arbitrium*, on the other hand, developed into the so-called *iudicium bonæ fidei*, of which more will be said later (cf. *infra*, § 64).

The stipulation was a form into which any transaction, or any part of any transaction, that involved future performance, could be framed. It was extremely common. It required no technical skill or expert advice to perform correctly. It could be as effectively carried out in a crowded market place as in a notary's office. Long after commercial exigencies had given validity to many groups of formless contracts, such as sale, leases, partnerships, and the like, it was common practice to put even these transactions into the stipulation form, so that the

<sup>13</sup> Buckland, Text-Book, p. 672 et seq. I. 4, 6, 28.

terms might be known with clearness. And for any incidental agreements, especially those which modified the usual elements of ordinary contracts, the stipulation was almost essential.

## PRÆTORIAN STIPULATIONS AND SPECIAL RULES

57. (a) Prætorian stipulations served the purpose of our judicial and official bonds. They were practically compulsory.
- (b) All stipulations were unilateral.
- (c) No one could stipulate or promise for a third party.
- (d) People incapable of stipulating might stipulate or promise by representatives.

Another use of the stipulation was to secure something like the official bonds of our system. Bonds are demanded usually for the purpose of securing the interests of one of the parties affected pending final determination, as in attachments, replevins, injunctions, appeals, and the like. Fiduciaries, such as guardians, trustees, or executors, are often similarly bonded. They generally interpose a third person as surety. The Romans used stipulations, called prætorian stipulations, for this purpose. But, at Roman law, the bond might be the party's own, and not a surety bond, although in many cases a surety bond would be asked for. If it was the party's own bond, the security it provided lay in the fact that it substituted an easily actionable penal sum for an indefinite obligation, which might be difficult to establish by competent proof.<sup>14</sup>

The characteristic element of these "prætorian stipulations" is that the promisor was forced to make them. Indeed, it seems to have been the prætor who framed the question and asked it. The promisor was compelled to answer as a condition to obtaining some other relief he sought, as in the case of our attachment or appeal bonds in our practice. But sometimes other pressure

<sup>14</sup> I. 3, 18, 2; D. 45, 1, 5, pr.

was placed upon him. If it was a threatened danger, such as an insecure building, which was to be prevented, the promisor either replied to the stipulation or else the threatened person was permitted to remove the danger himself. Often it must have been a peremptory order from the magistrate that forced the defendant to enter into the stipulation.<sup>15</sup>

Since the stipulation was the general form into which thousands of common transactions could be cast, and were cast, most of the general discussion of the elements of contract are found at Roman law in connection with the stipulation.

First of all, we must note that the stipulation differed in one important respect from the ordinary type of English contract. Although it needed the co-operation of two persons, it was wholly unilateral. Only one obligation was created. If Aulus and Numerius agreed to exchange the slaves, Stichus and Pamphilus, a binding contract could not be made for both by a single stipulation. Aulus must stipulate with Numerius for Pamphilus. And thereafter Numerius must stipulate with Aulus for Stichus. There was, therefore, an appreciable interval in which Numerius was bound, since he had formally promised, and Aulus was not bound. If Aulus, when asked in turn, refused to promise, he never became bound. But, in that case, if he had ventured to sue Numerius, he would be met with the exception of *dolus*, because it could hardly be otherwise than a deliberate attempt at overreaching the other to bring such an action.

Another characteristic of the formal contract was the requirement that no one could promise or stipulate for another.<sup>16</sup> If Aulus asked Numerius, "Will you pay Seius 1,000 sesterii?" and Numerius answered, "I will," the contract, if we omit "consideration," is complete at the common law. In those jurisdictions in which the rule of *Lawrence v. Fox*<sup>17</sup> prevails, not

<sup>15</sup> D. 39, 2, 2.

<sup>16</sup> I. 3, 19, 4; 3, 19, 19.

<sup>17</sup> 20 N. Y. 268. Cf. the exhaustive discussion in 1 Williston on Contracts, §§ 347-403.



only Aulus, but even Seius, can sue Numerius for the money. Where the rule of *Lawrence v. Fox* does not prevail, there is certainly no doubt that Aulus may sue. But at Roman law there was ordinarily no obligation at all. Seius could not sue, because he was not a party. Numerius had never bound himself up to him. Aulus again could not sue, because he had no "interest" in the matter; the technical expression is the Latin word "*interesse*." It did not concern him.<sup>18</sup>

If, as a matter of fact, it did concern him, if Seius was his creditor, his agent, his son, or his slave, so that payment increased his property, created an obligation in his favor, or relieved him of one, his *interesse* was at once established, and he could sue for breach of the promise.

In the same way, if Aulus said, "Do you promise that Lucius will pay me 1,000 hs.?" and Numerius answered, "I do," there was no obligation. Lucius had not promised to Aulus, and Numerius had not promised to pay. But, if the circumstances of the case permitted the words to mean, "I will attempt to induce Lucius to pay," Numerius would be at least bound to make the attempt.

The ordinary way in which the limitations here mentioned could be avoided was to add a penal condition. If Aulus made a new stipulation to the following effect, "If you do not pay Seius, will you pay me?" or, in the second case, if Aulus asked, "If Lucius does not pay me, will you pay me?" Numerius, by replying in the affirmative, was bound, and Aulus had an interest which would support an action.<sup>19</sup>

The requirement of bodily presence, actual, or by conclusive presumption, if there was a possibility of such presence and a written memorandum—the requirement that there must be physical capacity to speak, to hear and understand—made impossible contracts between idiots, deaf mutes, and contracts made by correspondence. But this could be cured in a simple way.

<sup>18</sup> D. 45, 1, 38, 20; I. 3, 19, 20.

<sup>19</sup> I. 3, 19, 19; D. 45, 1, 38, 17.

Slaves and *fili-familias* were natural representatives, and they could stipulate for the absent or the incapacitated person. But, when agency became familiar, free agents might equally do so, and the deaf mute, who could neither say, "Do you promise?" nor hear, "I do," could in some other way authorize another to say it for him. To appoint an agent, one needed no utterance; signs or writing would do, since mere agreement created the relation, without other forms.

The interpretation of the words used in stipulation and promise was a matter largely of common sense. What had once been a magic word, operating by its own force, had become significant, and it was merely a matter of discovering the significance by any means that were available. So, if one had asked for 10, and the reply was 20, the stipulation was good for 10, since it was assumed that one who was willing to give twice as much would have no hesitation in giving the amount asked for.<sup>20</sup> Again, if A had asked for 20, and N had promised 10, the stipulation was also good for 10. Similarly, if no time is mentioned, the money is due at once. And if a distant place, but no time, is mentioned, the money is not due until a reasonable opportunity has been given to get to that place.<sup>21</sup>

But the fundamental and technical rules are adhered to. Aulus may not stipulate, "Will you pay after my death?" That would be stipulating for a third person, the heir of Aulus. But a stipulation, "Will you pay me at my death?" is valid. And yet, since it becomes due at the moment of death, the claim descends to Aulus' heir, and he is the only man who will ever be able to sue upon it. While the general rule was always that an effort must be made to find out what the parties meant, it was not wholly forgotten that a special form, subject to special technical rules, was originally the real creator of the obligatory bond.<sup>22</sup>

<sup>20</sup> I. 3, 19, 5; D. 45, 1, 1, 4.

<sup>21</sup> D. 13, 4; C. 3, 18.

<sup>22</sup> I. 3, 19, 13; 3, 19, 15; 3, 19, 16; D. 45, 1, 45, 1. Justinian allowed stipulations "after death" of promissor or stipulator. I. 3, 11, 13; C. 8, 37(38), 11.

### CONSENSUS

58. It is stated that all contracts, including stipulations, required *consensus*, agreement. In practice, the agreement simply required an actual answer to the precise question put.

Was the fact of agreement itself a vital element? Did the stipulation, in order to be valid, need what in common law has been called a "meeting of the minds"? That really involves what has so often been called the "will theory" of legal transactions. Men are bound because they wish to be bound. The will is autonomous.

The merits of the controversy between those who support the "will theory" and those who support the "declaration theory," as far as it concerns modern law, cannot concern us here. But it is unfortunately impossible to ignore the issue as far as it affects Roman law, not only because Roman examples have been cited by the proponents of both views, but because we cannot, after all, understand a Roman obligation, unless we examine somewhat the general basis which, however mistakenly, Roman lawyers assigned to it. Common lawyers have sometimes spoken as though "meeting of the minds" was the essence of contractual obligation. This has been hedged in and qualified by conclusive presumptions, and limited by the large admission that the mental condition must necessarily be inferred from external acts.

Now, the Roman lawyers often speak of *consensus*, and often assert in special cases that absence of this *consensus* vitiates the supposed obligation. But I think we shall see that the term varies somewhat with the particular situation in connection with which the statement is made. It may be noted that neither at common law nor at Roman law was it ever contended that agreement in itself constituted an obligation. That would have been in flagrant contradiction with ordinary knowledge and experience. It could at best be maintained that agreement was

an essential constitutive element, though often not the only element, of an obligation.

So it is stated that *consensus* was necessary, even for the formal *negotium* of stipulation. That appears in Venuleius (2d century), and in Ulpian and Paul (3d century).<sup>23</sup> If N. has promised by stipulation to give A. a slave, and they are not speaking of the same slave, there is no obligation.<sup>24</sup> If we leave out the question of error, which must be specially considered in another place, what *consensus* really means here can be seen from the sentence immediately following. There the stipulator asked for one of two named slaves, and the promisor mentioned only one of them. There was no question and answer. Similarly, in the other cases to which Venuleius and Paul referred, there seems to have been no mention of a particular slave, and therefore that which N. promised was not that which A. stipulated for. We may say, as in the other case, *non ad interrogatum esse responsum*—"no reply has been given to the question." If N. attempted to plead that, when he said Pamphilus, he did not mean the Pamphilus whom A. had in mind, the same objection is possible that Paul makes to a suggestion of an older jurist, *semper negabit reus se consensisse*—"the defendant will always deny that he had agreed."

The point seems to be that *consensus* is a general word, that came to be loosely used for a more specific word, *conventio*, which retained in its obvious etymology something of the idea which underlay all obligatory transactions at Roman law. They are based upon a conscious co-operation of two persons, although this co-operation may not at all have been directed to the creation of the specific obligation that the law attaches to it.

<sup>23</sup> D. 45, 1, 83, 1; 45, 1, 137, 1; 2, 14, 13.

<sup>24</sup> I. 3, 19, 23.

## INVALID CONTRACTS

59. Consideration was not an element of Roman contracts. The term *causa*, often compared to it, is a different concept.

Invalidity was based on impossibility of performance or on public policy.

At common law, next to the agreement, or the "meeting of the minds," the most important element in contracts is consideration. Whatever consideration really is, it is certain that nothing very much like it existed at Roman law. It is often compared with the Roman *causa*. What this term means we shall have occasion to consider later. For the present the following fact must be emphasized: If at common law a gratuitous promise is made, it cannot be enforced. If at Roman law Aulus said, "Will you make me a present of 100?" and Numerius answered, "I will," he was bound to do so, and there was no *dolus* on Aulus' part in suing him for the amount.

A good deal is said in the texts of invalid stipulations, most of which can be applied to all contracts in general. The principles involved are for the most part those of the common law as well.

If A. stipulates for the sale of an article to which a title cannot be made out, such as a free man, public property, sacred property, or the like, the stipulation is void.<sup>25</sup>

If A. stipulates that N. shall give him what A. already has, the stipulation is futile, and creates no obligation.<sup>26</sup>

If A. stipulates for something impossible, the stipulation is void. The standard illustrations were, "Will you ascend into the sky?" "Will you pay me at Carthage to-day?" since Carthage could not be reached in a day from Rome.<sup>27</sup>

If A. stipulates on condition of doing something impossible,

<sup>25</sup> I. 3, 19, 2; D. 45, 1, 82; 45, 1, 83.

<sup>26</sup> I. 3, 19, 2; D. 45, 1, 31.

<sup>27</sup> I. 3, 19, 11; D. 45, 1, 7.



the stipulation is void; but, if he stipulates on condition of not doing something impossible, the stipulation is valid, and takes effect at once.<sup>28</sup>

If A. stipulates for the commission of a crime, that is, of course, in every respect invalid. But it is equally invalid if it is against public policy, though far short of a crime. So, if A. stipulates that, if he divorces his wife for her fault, she is to pay a penal sum, that is invalid, since the law has fixed the penalties for conduct justifying divorce, and means them to be exclusive.<sup>29</sup>

<sup>28</sup> I. 3, 19, 11.

<sup>29</sup> I. 3, 19, 24; D. 45, 1, 26; 45, 1, 27.

## CHAPTER 7

REAL CONTRACTS—THE *MUTUUM*

## Section

- 60. Real Contracts.
- 61. *Mutuum*.
- 62. Interest.
- 63. The *Senatus Consultum Macedonianum*.

## REAL CONTRACTS

60. A third type of obligation arose when one person has stripped himself of property in another's interest, or performed services for another.

This creates an obligation, the terms of which are measured by "good faith," which is in practice, reasonable expectation.

Paul distinguished four types: *Do ut des*; *do ut facias*; *facio ut des*; and *facio ut facias*.

Those in which the initial act was *dare*—i. e., the transfer of a *res*—were called "real" contracts.

There were four older types of real contracts: *Mutuum*; *commodatum*; *pignus*; and deposit.

Obligation has a double source. We may tie ourselves up by doing acts that can have no other effect or meaning than that of binding us. Or we may commit wrongs and be compelled to pay money, lest a worse thing befall us. But, in the dealings between man and man, there were many acts which were neither ritual nor wrongful, but which soon came to justify magisterial intervention, and thus be grouped with those that create obligations.

Suppose A. had stripped himself of his property in B.'s interest, or performed services for B.'s benefit. If both are honest men and good citizens, the transaction will not end there. It may be a gift, in which case B. owes his benefactor at least

gratitude, and, under all circumstances, ought not be permitted to evince an extreme ingratitude. And if it was not a gift, if there was an understanding that B. should do something in return, or if right-minded men would do something in return, this something would be required of him by good faith, and as soon as the magistrate took good faith under his protection, an obligation to act in good faith was created.

No doubt "good faith" is a term of vague and uncertain content. Yet it does not mean more than the standard of conduct one may reasonably expect from one's fellows. There seem to have been Greek communities in which a promise, not confirmed by oath or secured by pledge, was not obligatory.<sup>1</sup> That is only another way of saying that in these communities no one took such promises seriously, or regulated his conduct in reliance upon them. It was, therefore, not bad faith to break them. But at Rome, whatever may have been the reason, men did take such understandings seriously, and, when they did so, they claimed the magistrate's aid by as good a right as in any other case. Just as the magistrate's conscience shuddered at the breach of a bond created by the ritual of stipulation, just as it seemed unconscientious that a wrongdoer should go literally scot free, so in other instances *bona fides* made an urgent demand upon his intervention.

Now, transactions of good faith are as various as human relations. A great many schemes can be devised, into which most of them can be made to fall. One that is as good as any is the system devised in the third century by the jurist Paul. Taking the delivery of goods and the performance of services as typical or common acts, he made up four species, viz.: *Do ut des; do ut facias; facio ut des; facio ut facias*—"I give on the understanding that you will give;" "I give on the understanding that you will perform some service," etc.<sup>2</sup>

<sup>1</sup> Cf. the law of Charondas, Theophrastus, quoted in Stobaeus, *Florilegium*, 44, 22; Plato, *Laws*, 742C, 849E, 915E; <sup>2</sup> Vinogradoff, *Historical Jurisprudence*, pp. 231, 232.

<sup>2</sup> D. 19, 5, 5.

It will be noticed that the transaction is a visible external act, a *dare* or a *facere*. Until that takes place, whatever the understanding of the parties, there is no demand in good faith for the intervention of the magistrate. The relations of the parties need no readjustment, because they have not yet been disturbed. And, when the act has been done, the readjustment that the prætor will enforce is not based on the understanding of the parties. The recipient of the *dare* or the *facere* is not bound, because the two parties have agreed on a certain give and take. The "meeting of the minds," the real or the illusory character of the consent, has little to do with it. The prætor will try to make the recipient do what an honest man would wish to do under the circumstances.

But the understanding between the parties, their agreement, their consent, was not altogether irrelevant. If it did not create an obligation, it measured it. If we take the first species of Paul, *do ut des*, of which the commonest form was the exchange, it is plain that the understanding about what the things were that were to be exchanged must have been reached before the initial transfer took place. When it does take place, A. feels that he is entitled to counter performance. He certainly could not demand anything more, and B. could obviously not offer anything less. They are both estopped—we need not balk at the use of this excellent word, even in Roman law—to the extent that their words and conduct have indicated. It may well be that the magistrate, or the *iudex*, might question the equivalence of the counter performance. With that the *iudex* has nothing to do. The plaintiff cannot in good faith ask his associate in the transaction to set a higher value of what was first transferred than he himself had done. Perhaps men of an especially sensitive morality, philanthropists or saints, would do so. But it was not reasonable to expect that people ordinarily encountered should be philanthropists or saints, and good faith was merely this crystallized reasonable expectation.

A group of transactions which would all have been put into the framework, *do ut des*, had it existed when these transac-

tions originated, consists of those which in the Institutes are called "real contracts." The name was applied to them because they all began with the delivery of a *res* from A. to B., and they were so familiar and so old that the mere naming of them would constitute a sufficient understanding between the parties as to what was reasonably to be expected of them in the premises. The "real contracts" were the *mutuum*, or loan for consumption, the *commodatum*, or loan for use, the *pignus*, or pledge, and the deposit, terms which, even in their Latin form, have been orthodox elements of common-law terminology, since the case of *Coggs v. Bernard*.<sup>3</sup>

Some of these contracts are certainly older than law itself; that is, they must have been frequently entered into, and have forced themselves on popular attention, before a magistrate was ever called upon to vindicate their breach, or any breach. When it became common to call everything that justified the intervention of a magistrate an obligation, it was impossible to refuse that name to the bond created by these transactions, although it is likely that these transactions were longer left to the consciences of individuals to adjust than the stipulation or the delict.

In the case of the stipulation, the promisor was bound when he had uttered the binding word or its equivalent. In the case of the delict, he was bound when he had done the wrongful act. In these "real" contracts, there was also a simple and easily determinable moment at which the obligation came into existence. That was the actual delivery of the *res*.

### MUTUUM

61. The *mutuum* was a loan for consumption of fungible goods—goods that are sold by weight and measure. The commonest was a loan for money.

The obligation of the borrower was to return the exact equivalent.

<sup>3</sup> I. 3, 14, pr. (1703) 2 Ld. Raym. 909, 1 Smith's Lead. Cas. 369.



If the transaction was ambiguous, no obligation arose.

The money transferred might be recovered in quasi contract, unless there was ground for an exception of *dolus*.

The most important of these contracts is undoubtedly the *mutuum*, the loan for consumption. The subject of the contract was the type of goods we call "fungible" and the obligation was very simple. The recipient was bound to return the exact equivalent of what he had received, and since, by definition, fungible goods are those in which the units are interchangeable, that was not difficult to do.<sup>4</sup>

Of all fungible goods, money is far the most important, and accordingly, in most cases of *mutuum*, we deal with money loans. But the *mutuum*, of itself, would never have permitted financial transactions to grow up. The only obligation was, as has been said, the restoration of the quantity received. A loan did not of itself carry interest, and yet obviously for commercial purposes the possibility of earning interest is the chief reason for the making of a loan. Interest could be added to a loan by a particular stipulation to that effect.<sup>5</sup> It is apparent, from the title in Justinian's Code which deals with this subject, that the transaction was almost always reduced to writing and evidenced by a document (*instrumentum*, or *cautio*).<sup>6</sup> It further appears that a common stipulation provided that, if the interest was not duly paid, a higher rate was owed because of the default, provided that in no case it exceeded the legal rate.<sup>7</sup>

Paul, as we might expect (*supra*, § 31), required an intent to receive the thing back in kind as the essential of a *mutuum*.<sup>8</sup> That is to say, the mere fact that A. gives money to

<sup>4</sup> I. 3, 14, pr.; D. 12, 1, 2; 44, 7, 1, 2.

<sup>5</sup> D. 19, 5, 24.

<sup>6</sup> C. 4, 2, 17; D. 12, 1, 40, pr.; 20, 1, 20; 22, 3, 25, 4; 44, 7, 29; C. 4, 2, 14.

<sup>7</sup> D. 22, 1, 12.

<sup>8</sup> D. 44, 7, 3, 1.

N., which becomes N.'s property, is an ambiguous transaction. It may be a gift, or a loan, or payment for something sold, or to be sold. Which it is depends upon other facts—statements made, letters written, acts performed, and to that extent, accordingly, the intent to make a loan is essential. But what if these facts are themselves ambiguous, so that the two parties might with propriety have different opinions on the matter? The general rule is that in these cases there is no obligatory transaction of any kind. But there is consequently an action in quasi contract to recover the amount transferred by A. to N. In some instances, however, no action, even in quasi contract, is available to A. because of a principle somewhat resembling an estoppel. The following will illustrate this situation:

A. gives money to N., which he intends to be a gift; and we assume evidence of this intention is available. N., however, understands the transaction to be a loan, and uses the money. If A. discovers N.'s mistake before N. has used the money, he may recover the amount. After the money is spent, N. can interpose the exception of *dolus*. It seemed unconscionable, apparently, that A. should get back what he had willingly parted with, even though N. was in no way misled.<sup>9</sup>

If the situation were reversed, if it were A. who had reasonably assumed the transaction to be a loan, or a bailment, and N. had misconceived it, there was no *dolus* in A.'s getting back his money, and such recovery was in general permitted.

Certain special situations may deserve mention. It is well to remember that money was always metallic money, and that the financial medium had therefore no such elasticity as modern commerce demands. A certain amount of flexibility was obtained by various devices, most of them requiring the interposition of the contract of mandate (*infra*, §§ 102–107). We need not concern ourselves here with the contract of mandate itself, but rather with one of its effects. If S. owed money to A., and A. bade him lend the amount to N., there was a

<sup>9</sup> D. 12, 1, 18.

*mutuum* between A. and N. as soon as the money was paid, although no *res* had passed between the two.<sup>10</sup> Such payment discharged the debt of S. to A. A promise by S. to make this payment, even by way of stipulation, would bind S. in an action by A., but would not create the relation of debtor and creditor of a *mutuum* between A. and N.

Another special situation is the case in which A., having no available money to lend N., gives him, instead, some unminted silver or other article, the proceeds of which he is to use as a loan. In the normal course of events, N. will sell the article, and as soon as he does so he will owe A. the proceeds as a *mutuum*. But the situation before he has done so has certain peculiarities. N. may be considered as the agent of A. for the sale. In that case he is not responsible for any accidental loss, but there is no reason why A. cannot revoke the agency and repossess himself of the article.<sup>11</sup>

Again, the facts may negative any agency in N. Such facts might be that the loan was gratuitous; that A. was not a merchant or had never shown any wish to sell the article. In that case property certainly passed to N., and the risk was on him; but, if he failed to sell the article, he was, after a reasonable time, liable in quasi contract to A. for its value.

## INTEREST

62. The action on a *mutuum* was the *condictio*, as in a stipulation, and was *stricti iuris*.

Interest would not be payable, unless there was a stipulation to that effect.

After futile legislation against interest, a legal rate of 12 per cent. was allowed, until it was changed by Justinian to 8 per cent. for business loans and other special rates from 4 to 12 per cent.

<sup>10</sup> D. 12, 1, 9, 8.

<sup>11</sup> D. 12, 1, 11, pr.

**Compound interest and accumulations beyond a certain amount were generally illegal.**

The *mutuum*, it has been said, was in itself not a commercial transaction, since it did not carry interest. The obligation was indeed enforced by an *actio* (*iudicium*) *stricti iuris*, the *condictio certæ pecuniæ* or *triticaria* (supra, § 55); that is, one in which the instructions given to the *iudex* were sharply limited, and in which he was required to give or to refuse a precise sort of relief. But it retained something of the character of other real contracts, which may be said to have grown up out of the design to prevent kindness from being abused, by restoring what one person had given to another, unless it was meant as a gift. This notion was emphasized by the widespread prejudice against interest which all agricultural communities show—a notion probably arising from the readiness with which lending money at interest can be abused, and the disastrous results to the landed proprietor of such abuse. It is for that reason that only by stipulation could an obligation to pay interest be created, so that such virtue as resided in formality of transactions might accrue to the borrower.

This requirement was maintained throughout Roman history. But it suffered several modifications later on. It did not apply to loans of grain and the like, in which no such danger of exploitation by professional money lenders was apprehended.<sup>12</sup> In that case any understanding or agreement, no matter how reached, that interest was to be paid, created a binding obligation to pay interest. Just how these agreements came to be binding we shall see later (infra, § 117, 4).

Otherwise, informal agreements to pay interest had at least this effect: If interest was paid in accordance with them, the money could not be recovered. The agreement created what both at Roman and common law is called a natural obligation.<sup>13</sup>

The general prejudice against interest on money was dis-

<sup>12</sup> C. 4, 32, 11.

<sup>13</sup> C. 4, 32, 3.

played in very early limitation in regard to the rate which could be demanded. As early as the Twelve Tables the rate was fixed at one-twelfth the amount per year; i. e.,  $8\frac{1}{3}$  per cent.<sup>14</sup> Apparently the law was evaded or disregarded. In 357 B. C. another law *lex Duilia-Menenia*,<sup>15</sup> was passed, repeating the provisions of the XII Tables and perhaps intensifying the penalty. Ten years later the rate was reduced to half, and five years after that, in 342 B. C., by a *lex Genucia*, the impossible was attempted, and interest of any sort was completely forbidden.<sup>16</sup> It is unlikely that this law was of long duration. At some time before Cicero, either by statute or by prætorian interposition, 12 per cent.—1 per cent. a month—was fixed as maximum lawful interest. We have the curious economic fact that in Cicero's time, and several centuries later, most loans were made at a rate considerably below this. Four per cent. was usual, and 8 per cent. was considered high.<sup>17</sup>

Usurious loans were not void.<sup>18</sup> But the usurious interest could not be collected, and, if paid, could be recovered with the tort penalty of quadruple—doubtless, the amount paid and three times as much again.<sup>19</sup> Finally the whole matter was regulated by Justinian.<sup>20</sup> He established several rates—8 per cent. for business loans, 4 per cent. for private loans made by men of the upper classes. Otherwise the general rate of interest was to be 6 per cent. He later reduced interest on loans made to farmers to  $4\frac{1}{6}$  per cent. But, instead of a quadruple penalty, it was merely provided that excess interest paid should be charged against the principal.

On the matter of accumulation and compound interest, the

<sup>14</sup> Tacitus, *Annales*, 6, 16.

<sup>15</sup> Livy, 7, 16, 1.

<sup>16</sup> Livy, 7, 42, 1.

<sup>17</sup> Cicero, *Ad Atticum*, 1, 12, 5; 4, 15, 7; *Ad Quintum Fratrem*, 2, 14, 4.

<sup>18</sup> D. 22, 1, 20.

<sup>19</sup> D. 12, 6, 26, 1. Gaius, 4, 23; C. Th. 2, 33, 2.

<sup>20</sup> C. 4, 32, 26; N. 13; 121.



older law had provided that the amount of accrued and unpaid interest should never make the sum actually due at any one time equal to more than twice the principal. Compound interest might perhaps be expressly stipulated for, although this is doubtful. At any rate, interest already due might by stipulation be added to the principal.<sup>21</sup> Justinian modified this as well. No money lent was to carry interest at all after the interest, whether accrued or paid, equaled the principal—a provision that would render impossible investments for more than 20 or at most 25 years. As for compound interest, that was under no circumstances whatever to be permitted.<sup>22</sup>

It is evident that these laws could easily be evaded, and it is certain that they were evaded. Their irksomeness would not be so apparent in a state in which financial operations were on a restricted scale. But they testify to that general attitude which made the church's prohibition of all interest throughout medieval times an extremely popular thing.

### THE *SENATUS CONSULTUM MACEDONIANUM*

63. Loans to a *filius-familias* were made unenforceable by this statute.

There were a number of exceptions: Ratification by the *filius-familias*; acquiescence by the *paterfamilias*; an adequate *peculium*; and good faith of the lender.

In the principate of Vespasian, 69–79 A. D., a *senatus consultum* was passed which forbade loans to a *filius-familias*. It was called the *senatus consultum Macedonianum*, after one Macedo, a usurer who had made such a loan and thereby instigated a hard-pressed debtor to kill his father in order to enter into his inheritance. To prevent tragic possibilities like these, the *senatus*

<sup>21</sup> D. 12, 6, 26, 1; 42, 1, 27.

<sup>22</sup> C. 4, 32, 28.

*tus consultum* declared that no action would lie to recover money lent to a *filius-familias*.<sup>23</sup>

But, just as in the case of the English Statute of Frauds, the purpose which the law set before itself determined the application of the rule, the loan was not really void, but merely unenforceable, if the defendant *filius-familias*, at any time, either before or after his father's death, set up the *senatus consultum* by way of exception. If he did not set it up, he waived it, just as is generally the case at common law with the defense of the Statute of Frauds. But the loan created at least a natural obligation, and, if the *filius-familias* paid it, he could not recover the money.<sup>24</sup> Again, if the *filius-familias*, becoming *sui iuris*, agrees, however informally, to pay the loan, the exception is lost, or even if, under those circumstances, he makes a payment on account.<sup>25</sup>

It is also lost in the following cases: When the *paterfamilias* has assented to the loan, or derived profit from it, or subsequently ratified it;<sup>26</sup> when the *filius-familias* had an adequate *peculium castrense*, or *quasi castrense* (supra, § 38), and therefore property of which he could freely dispose.<sup>27</sup> In all these cases, the danger which such loans seem to entail is obviated by the special circumstance, and the exception could be met with a conclusive replication.

It was also held that, when the *filius-familias* was quite commonly supposed to be *sui iuris*, the defense would not lie. To be sure, the pressure of debts might drive a son to the crime of parricide even here, but it could not be assumed that the money lender was in any sense an accomplice.<sup>28</sup> Again, a reasonable loan to a son studying abroad could not be met with the defense of the *senatus consultum*.<sup>29</sup>

<sup>23</sup> D. 14, 6; Suetonius, Vespasian, 11; I. 4, 7, 7.

<sup>24</sup> D. 12, 1, 14; 14, 6, 10.

<sup>25</sup> C. 14, 6, 16.

<sup>26</sup> D. 14, 6, 12; 14, 6, 7, 12; C. 4, 28, 4; 4, 28, 7.

<sup>27</sup> D. 14, 6, 1, 3; 14, 6, 2.

<sup>28</sup> D. 14, 6, 3, pr.; 14, 6, 19.

<sup>29</sup> C. 4, 28, 5. D. 14, 6, 7, 13.

It was only in money loans, not for debts created otherwise, that the exception was allowed. And if the loan took the place of another debt, by way of novation, the exception did not lie.<sup>30</sup>

<sup>30</sup> D. 14, 6, 3, 3.

## CHAPTER 8

### REAL CONTRACTS—COMMODATUM, DEPOSIT, PLEDGE AND MORTGAGE

Section

- 64. Obligation of Good Faith and Diligence.
- 65. *Commodatum*.
- 66. Deposit.
- 67. Irregular Deposit.
- 68. *Pignus* (Pledge).
- 69. *Lex Commissoria* and Foreclosure.
- 70. *Hypotheca* (Mortgage) and Its Enforcement.
- 71. Implied Mortgages.

### OBLIGATION OF GOOD FAITH AND DILIGENCE

64. Other real contracts were based upon neighborliness and were gratuitous. They gave rise to "actions of good faith," *bonæ fidei*, not *stricti iuris*.

The common duty of the bailee was that of returning the *res*. To account for its loss he had in *commodatum* to show *exacta diligentia*, "special diligence," or absence of "abstract negligence," *culpa levis in abstracto*.

In the case of a deposit he had to show "simple diligence," or absence of concrete negligence, "*culpa levis in concreto*."

Every case was in fact a special one, and imposed particular duties.

The *mutuum*, without a stipulation for interest, could have little or no commercial importance. Two other "real" contracts, the loan for use, or *commodatum*, and the deposit for safe-keeping, have still less. The essence of both is that they were gratuitous.<sup>1</sup> They are transactions of neighborliness—the sort of

<sup>1</sup> I. 3, 14, 2.

actions that good men freely do for each other, and, when the duties in respect of them came to be called obligations, the extent of the obligation was measured by the opinion of good men in the matter. The care of the property in the deposit, its use in the *commodatum*, could not be paid for. If an agreement for payment was made, it denatured the transaction. It was no longer one of the contracts named, but a wholly different one. Yet a great many collateral agreements could be made, concerning the place or the nature of the use or custody, and these were eminently material in determining the good faith of demanding restitution of the *res*. If a borrower could not restore the property and had been guilty of carelessness, he might still plead, by way of exception, that he had been specially exempted from the duty of care by the lender, either by word or act.

These contracts accordingly are enforced by an action of a different sort. It was not, as in the stipulation or the *mutuum*, an action of strict law, *actio stricti iuris*. Nor was it, as in delict, an easily determinable penalty. The magistrate could not limit the *iudex* to granting or refusing a strictly limited type of relief. In deposit, or *commodatum*, the primary obligation was apparent enough. It was the restoration of the *res*. But this was just what in most cases could not be done, if the matter came into court at all. The *res* had generally been destroyed by accident or carelessness. The situations in which the depositary or commodatary willfully refused to restore it were rare, and when they occurred it was really a case of *furtum*, and could more conveniently be so dealt with.

But just what relief the lender or depositor was entitled to depended on so many circumstances that the magistrate could do little else than instruct the *iudex* to give whatever relief a good man, *vir bonus*, would allow, to decide that the litigants should act as good men would act, or to distribute the loss in the most equitable way. It may be that this sort of thing was in very ancient times called an *arbitrium*, rather than a *iudicium*; but the latter became the general word, and, by an intelligible abbreviation, a *iudicium*, in which the *iudex* was to bid the liti-



gants do what in good faith they ought to do, was called a *iudicium* (later, an action) of good faith.<sup>2</sup>

The procedural characteristic of such actions was that it was unnecessary to raise issues by special pleas of *dolus*, or particular agreement, or the like. The *iudex* could take these circumstances into account, although no mention of them appeared in the *formula*. His chief concern came to be in determining whether the bailee in each case had exercised as much care as under the circumstance he ought to have done. If the thing had been lost without any one's fault, the giver could not very well *ex fide bona* (in good faith) demand it. Nor was there good faith or good sense in such a demand, even if the thing was lost through the recipient's carelessness, when, as in the case of deposit, the giver ought to have taken the recipient's bad habits into account. A borrower for use, on the contrary, whether known to be careless or not, might reasonably be expected to exercise an unusual degree of diligence.

The amount of care to be used has been somewhat unduly schematized. Lord Holt, in *Coggs v. Bernard*,<sup>3</sup> laid down, believing that this was the rule of his Roman models, that in the ordinary business bailment for hire ordinary diligence was required, in the *commodatum* utmost care was to be demanded, and in deposit only a slight degree. The absence of this amount of care was actionable negligence. Manuals of Roman law, however, distinguish between "special diligence," *exacta diligentia*, and "simple diligence," *diligentia quanta in suis rebus adhiberi solet*. The absence of *exacta diligentia* was "abstract negligence," *culpa levis in abstracto*; the absence of *diligentia quanta* was *culpa levis in concreto*, "concrete negligence."<sup>4</sup>

But these discriminations are of only slight value. It is not

<sup>2</sup> Cicero, pro Q. Roscio Comædo, 4, 10; 4, 11; De Officiis, 3, 66-70; Gaius, 4, 47, 63.

<sup>3</sup> (1703) 2 Ld. Raym. 909, 1 Smith's Lead. Cas. 369.

<sup>4</sup> C. 50, 16, 213, 2; 16, 3, 32; 50, 16, 226; Buckland, Text-Book, p. 551 et seq.; Girard, Manuel, p. 688; Mitteis, Römisches Privatrecht, p. 315 et seq.

really correct to say that the bailee was under an obligation to use a certain amount of care. No action lay against him, even if he did not. But the amount of care which in any given case he actually did take was highly material in determining whether he ought to make restitution, if the *res* should be lost. It has been found practically impossible to say what *culpa levis in abstracto* or *culpa levis in concreto* really was. And the various senses in which the term "gross negligence" is used, *culpa lata*, or *culpa lator*, are still more difficult to determine. When these terms occur in our texts, they seem to be rather descriptive words, getting their real significance from the context, than technical terms.

### COMMODATUM

65. *Commodatum* was a gratuitous loan for use.

The lender in an *actio commodati directa* (direct action) sued the borrower for failure to return the *res*, or for injury to the *res*, unless he proved *exacta diligentia*.

The borrower sued in the *a. c. contraria* (contrary action), if he was injured by the use of the *res*, or had to make unexpected expenses.

All these matters might be changed by agreement.

The nature of *commodatum* has been sufficiently indicated. A. lends N. his slave, his horse, his plough, to be used in a special way, or for a limited time, or in a particular place. Deliberate misuse, as has been seen (*supra*, § 45), was conversion, *furtum*, or damage under the *lex Aquilia*, although one might also sue in *commodatum*. The obligation was to restore the thing in specie when the bailment should terminate, and the obligation came into existence—and not before—when A. delivered the *res* to N.<sup>5</sup>

If N. failed to return it, barring theft, A. sued him in the action called *actio commodati directa*, and, if there were no com-

<sup>5</sup> I. 3, 14, 2; D. 13, 6; C. 4, 23.

plicating circumstances, his damages were the value of the article at the time it should have been returned. But N. also had an action against A., called *actio commodati contraria*, if he had been put to unavoidable expenses or had suffered injuries because of the bailment. These expenses must be expenses, neither trivial in amount nor obviously contemplated by the contract. The maintenance of a slave or an animal was not an expense that could be recovered from the lender, but the care of a sick slave, or the expense in recovering a runaway slave, furnished a basis for compensation.<sup>6</sup>

If the *res* is not returned intact, the bailee must account for it. What is a satisfactory account depends wholly on the facts. A slave whose propensity to run away has been duly indicated must be more closely watched than one about whom no warning has been given. An animal given for plowing must be differently treated from one given for riding. And the particular understanding is vital. The bailee may have specifically insured the article, and the bailor may have expressly waived all but the slightest care.<sup>7</sup>

But all cases of *commodatum*, have, after all, the characteristic that the bailee alone or chiefly benefits by it. It is a matter of good faith, consequently, that he shall be held to exercise, not merely his usual care, but the care of a reasonable man. Gaius describes him as a *diligentissimus paterfamilias*, and the common law knows him as the good husbandman, whose care was the limit beyond which use of property was waste. How varied such care may be we have already seen, but in certain common, or at any rate discussed, situations there was a *prima facie* case that such care had been used. These situations were death from natural causes, hostile inroad, attack by robbers or pirates, shipwreck, and accidental fire. If exposure to these losses was due to the bailee's negligence, he was, of course, liable, and doubtless he was liable if he had not promptly attempted to repair the damage provided that it was reparable.

<sup>6</sup> D. 13, 6, 17, 1.

<sup>7</sup> D. 13, 6, 3, 1; 13, 6, 18.

We need not speak of burden of proof in these matters. The entire circumstances would be gone into under the formulary procedure before the *iudex*, and the latter was instructed to give the plaintiff no more than he was entitled in good faith to have.

The action of *commodatum* was wholly personal, as between bailor and bailee. It had nothing to do with title or rightful possession of the *res*. The rule that the bailee cannot dispute the bailor's title, which in practice is only qualifiedly true at the common law, was completely true at Roman law. A thief or borrower or finder might lend a stolen or found or borrowed *res*, and if it were not returned, or were carelessly lost, he might sue the bailee, and his own defect of title was not an adequate defense for the latter.<sup>8</sup> Again, suppose the bailment to have been made for an expressed time. It is said that the bailor cannot demand the *res* back before the expiration of the time. This means simply that, if the bailee refuses to return it, he commits no conversion. If the bailor, however, retakes it by force or stealth, that is equally no conversion; but the bailee may, in an action *commodati contraria*, recover the damages caused.<sup>9</sup>

## DEPOSIT

66. Deposit is a bailment for safe-keeping.

The direct action of deposit was maintained to recover the value of the *res*, if it was not returned or injured.

The depositary was excused by the exercise of *diligentia quanta*, "simple diligence."

The contrary action of deposit was maintained under the same conditions as *commodatum*.

A condemnation in an action of deposit involved infamy.

<sup>8</sup> D. 13, 6, 15; 13, 6, 16.

<sup>9</sup> D. 13, 6, 21, pr.

In a *depositum miserabile*, "deposit by necessity," the depositary was held to *exacta diligentia*, and was liable in double damages.

A stakeholder or escrow holder (*sequester*) was a special type of depositary, who could use possessory remedies.

The deposit was even more characteristically than the *commodatum* a contract of neighborliness. Its violation was one which impressed popular imagination with especial force as a moral wrong. "Not to return a deposit" was an almost proverbial description of rascally conduct.<sup>10</sup> In view of the special conditions of life at Rome, the relative absence of facilities for warehousing and storing, the dangers and difficulties of travel, reliance on the care of friends, was very common and practically indispensable.<sup>11</sup> Only under one set of circumstances did deposit develop into commercial importance, and that, as we shall see, was not a deposit in the strict sense, the *depositum irregulare* (infra, § 67).

The obligation was, as in the case of *commodatum*, created by the actual delivery of the *res*. Again, as in *commodatum*, the substance of the obligation for the depositary consisted in the duty to return the *res*, when the deposit was over, which would regularly be upon demand of the depositor. There was, of course, no duty on the part of the depositor to pay anything for the service rendered, since these contracts are essentially gratuitous (supra, § 64).

If he did not return the *res*, the depositary must account for its loss, and in this case a less degree of diligence than in *commodatum* was demanded. He need only take as much care as he ordinarily took of his own property—*diligentia quanta*, etc. (supra, § 64). The depositor took the risk of the bailee's habits. The texts in the Digest often speak as though the depositary were liable only for *dolus*; but, when we remember

<sup>10</sup> Cicero, *De Officiis*, 3, 25.

<sup>11</sup> I. 3, 14, 3; D. 16, 3; C. 4, 34.



the elastic character of that term, we can see that it will readily cover any case of deliberate neglect, and, whether one's habits were careless or careful, a greater carelessness than usual would be *prima facie* deliberate.<sup>12</sup>

It was a simple enough thing to change this by agreement. If it were specially agreed, the depositary might be responsible as an insurer, and assume the entire risk of the loss. Again, other facts might modify the usual rule. A voluntary offer to become a depositary carried with it the assumption of all risks, except that of accidental destruction. But even an express agreement could not have the effect of relieving the depositary from responsibility of loss through *dolus*. That was against public policy.<sup>13</sup>

A depositary assumed no liability for anything he did not expressly take under his guardianship. If he received a slave, he was not a depositary of the slave's clothes; if a horse, he had no responsibility for its harness. But, if he took a sealed bag or chest, he was responsible for its contents, though he did not know what they were, and he could be sued as though any one of the specific contents had been left with him.<sup>14</sup>

Again, the contract might be transformed from a deposit to a *commodatum*. If A. left an article with N., to be kept for him, with permission to N. to use it, if he chose, it was a deposit until N. used it, after which time it became a *commodatum*, with the corresponding change of liability.<sup>15</sup>

*Dolus* might be wrongful neglect, but it was also deliberate misuse or misappropriation. In the latter case the depositor had his election to treat the act as *furtum* and proceed accordingly. But there were situations in which the responsibility did not go quite so far. Suppose the depositary had sold the *res*, and later had repurchased or otherwise acquired it. He had committed *furtum*, but, as he was ready to restore on demand, the de-

<sup>12</sup> I. 3, 14, 3; D. 16, 3, 32; 44, 7, 1, 5.

<sup>13</sup> D. 16, 3, 16; 16, 3, 1, 7.

<sup>14</sup> D. 16, 3, 1, 5; 16, 3, 1, 41.

<sup>15</sup> D. 16, 3, 29, 1.

positor was not injured. Yet his *furtum* involved this penalty, that he become an insurer of the article, and, if it was accidentally lost, he could be held in the action.

This action, as in *commodatum*, was called *actio depositi directa* when brought by the depositor, and *actio depositi contraria* when brought by the depositary to obtain reimbursement for unexpected expenses or compensation for unforeseen injuries. Indeed, for such expenses he could retain the *res* as subjected to a lien, although in general a counterclaim did not lie in an action of deposit.

It is plain that, even if the deposit was for a fixed time, the depositary had no ground of complaint, if the depositor recalled it earlier. The converse apparently did not hold. The depositary who had accepted the custody for a set time could not in all cases offer the thing back and ask to be relieved. Yet for good reason he could apply to the magistrate, and, if it was inconvenient or impossible for the depositor to receive it, it might be left in the care of some temple.<sup>16</sup>

As in the case of *commodatum*, no interest in the property was acquired by the deposit. If it was stolen from the bailee, the latter was ordinarily not liable, even if the theft had been made possible by his own carelessness. For that reason the depositary had no action against the thief, although, as we have seen, a solvent commodatary had (*supra*, § 46). But a depositary might himself deposit the *res*, and could hold the subdepositary in an action of deposit on the case, *actio utilis depositi*.<sup>17</sup>

Conversely, he could not ordinarily question his bailor's title. If a thief, or even a highwayman, made the deposit, he might claim the *res* in an appropriate action. Yet, apparently, if the true owner claimed them, he was to be preferred. This must have placed a serious burden on a depositary, if he was compelled to try title between his bailor and another claimant. Per-

<sup>16</sup> D. 16, 3, 1, 36.

<sup>17</sup> Paul, Sentences, 2, 12, 8; D. 16, 3, 16; I. 4, 1, 17; D. 47, 2, 14, 3.

haps, as in other cases, he might relieve himself by depositing the *res* in a temple with the *prætor's* permission.<sup>18</sup>

Since to be condemned in an action of deposit implied a proven accusation of *dolus*, the action had a delictual tinge. The convicted depositary was *infamis* (supra, § 47).<sup>19</sup> Indeed, by the Twelve Tables, he was condemned to double damages—which was reduced to simple damages in the *prætor's* edict. But there was a special case, expressly provided for in the edict, in which the delictual character was apparent. If in case of a sudden disaster, a shipwreck, a riot or invasion, a conflagration, A. had been forced to leave his property with a more fortunate neighbor, N., the latter could not refuse to deposit, and further was liable to double damages if he failed to restore it. And in this case he could not validly account for its loss, unless he showed that he had used the abstract care of a *diligentissimus paterfamilias*; i. e., *exacta diligentia* (supra, § 64).

This sort of deposit, called later the *depositum miserabile*, is not altogether unknown in common-law jurisdictions. It is likely enough that, where it does occur, it is directly borrowed, and it is an institution that obviously makes a strong imaginative appeal.<sup>20</sup>

An important type of depositary was the *sequester*—the escrow holder or stakeholder. There were many instances in which such a person would be employed, but the commonest was perhaps the cases of a disputed title, which might take time to decide. Putting the *res* into the hands of a *sequester* prevented a prescriptive title from being acquired by either claimant.

Otherwise, the *sequester* was liable in the *actio depositi* and in the *actio furti*, if he meddled improperly with the *res*, and his rights were equally those of a depositary. But his duty was to return it to one of the claimants, who might be not his bailor, but the one determined to have the right of possession.<sup>21</sup>

<sup>18</sup> D. 16, 3, 31.

<sup>19</sup> C. 4, 34, 10.

<sup>20</sup> I. 4, 6, 23; D. 16, 3, 1, 1; 16, 3, 18.

<sup>21</sup> D. 16, 3, 5; 16, 3, 7, pr. 50, 110; C. 7, 65, 5.

## IRREGULAR DEPOSIT

67. A deposit to a banker (*depositum irregulare*) might be the equivalent of a loan (*mutuum*), without its inconveniences.

The banker was required to keep a sum on hand equal to his deposits.

Interest might be agreed on informally.

It is customary at the present time to speak of "depositing" money in a bank, especially if it is a savings bank. At the common law this is, of course, not a deposit at all, but a loan, establishing merely the relation of creditor and debtor, and generally giving the depositor no preference over other general creditors. In the public mind, however, the idea of a deposit in such a case is tenaciously held, and an insolvent bank is always treated as having fraudulently appropriated property confided to its care.

Similarly, at Rome, money left with a banker might be a loan outright, but it was often called a deposit. If it was so called, important legal consequences followed. If the obligation was to return, not *in specie*, but *in genere*, only an equal amount of coins of that denomination could be called for; but, as no use of the money was permitted to the banker, he was in effect obliged to keep on hand a sufficient amount to meet the deposit.<sup>22</sup>

If the money is to be used without such a reserve, it is evidently an ordinary *mutuum*, and the usual consequences happen. Title and risk passed to the borrower, the action was one of strict law, counterclaim would lie, and the *senatus consultum Macedonianum* was a defense. If it had been agreed in advance that the recipient might use the money, it was a *mutuum* at once, whether he used it or not. If permission was later given, or if it was open to the depositary to use it, or to treat it as a deposit, it did not become a *mutuum* until he actually used it, or perhaps in some other way indicated his election to treat it as a *mu-*

<sup>22</sup> D. 16, 3, 7, 2; 16, 3, 7, 3.

*tuum*.<sup>23</sup> There was considerable advantage in keeping it as a deposit. The action was *bonæ fidei*, interest was due on default without special agreement, no counterclaim lay, the defense of the *senatus consultum Macedonianum* was not good, and the condemned defendant was not *infamis*.

In the time of Justinian, not even the defense that no money or no such amount had been deposited was good (*exceptio non numeratæ pecuniæ*), if there was a written document, duly attested, which recited the deposit or the amount.<sup>24</sup>

A document of the year 167 A. D. gives us a specimen of such a document:

"In the consulship of Verus and Quadratus, on May 28th, Lupus Carentis declares that he has received from Julius Alexander 10,050 sesterii intrusted [i. e., deposited] with him, which he is under a duty to return without dispute or question."<sup>25</sup>

### PIGNUS (PLEDGE)

68. A bailment for security was called *pignus* (pledge).

The pledgee creditor was liable for *exacta diligentia*.

Unauthorized use was theft.

The direct pledge action (*actio pigneraticia*) lay to recover the *res* or for damages.

The contrary action lay for reimbursement of necessary expenses or indemnity for injuries.

The fourth of the "real" contracts was the pledge. Its character is apparent enough from its name. As far as it is security for other obligations, it must be dealt with later (*infra*, § 69). For the present we must content ourselves with noting its characteristics as a bailment.

The obligation of the pledge was to return it upon tender of performance of the obligation it was meant to secure. Evidence

<sup>23</sup> D. 12, 1, 9, 9.

<sup>24</sup> C. 4, 30, 14.

<sup>25</sup> C. I. L. III, 949; xlx.



only of great care—*exacta diligentia*—acquitted him, if the pledge *res* had been lost, which meant in practice that he was *prima facie* freed of liability only in cases of robbery, riot, fire, war, or loss by natural causes. Any use of the *res* was *furtum*, unless it was expressly permitted, and he had a contrary pledge action, if he was damaged or put to expense by keeping the article.<sup>26</sup>

Failure to surrender the pledge was the basis of the direct pledge action (*actio pigneraticia directa*); but, as in the case of deposit and *commodatum*, such a failure was not in itself a conversion, as it would be at the common law. The action was *bonæ fidei*, and the demand carried interest from the day of default (*mora*).

As in *commodatum* and deposit, a contrary pledge action lay on the pledgee's part to recover any expenses, not impliedly or expressly agreed upon, or to recover all damages caused by the *res* which were not due to his own negligence (*actio pigneraticia contraria*).<sup>27</sup>

The purpose of the pledge was the obvious one of making sure that the obligation which it secured would be performed. There has always been a popular opinion that, if there is a default in the obligation, the pledged *res* becomes the property of the creditor. This seems to have come from the idea that the *res* is a hostage for the performance, and in fact some such idea may have been the origin of the institution.

But, if this belief has been prevalent, there has always been an equally widespread feeling that pledges are ready instruments of oppression. From very early times, legislative and judicial effort has been directed to soften the incident of this oppression, and prevent an unfortunate debtor from being made to pay something largely in excess of his debt.

<sup>26</sup> I. 3, 14, 4; D. 13, 6, 18, pr.; 13, 7, 13, 1; 13, 7, 13, 14.

<sup>27</sup> D. 13, 7, 9, pr.

### LEX COMMISSORIA AND FORECLOSURE

69. The policy of the law was against vesting title to the pledge in the creditor on the debtor's default.

An agreement to that effect was finally made invalid, except as a conditional sale.

The power to sell could not be waived, but ample opportunity was allowed for redemption.

It was provided early that, if no special agreement is made that ownership should pass, a default would not pass title. The principal effect of this rule was that such a special agreement, called *lex commissoria*, was quite generally added to pledge contracts.<sup>28</sup> It usually provided for a certain additional time within which the property might be redeemed. In a rescript of Severus, a pledge like this was classed as a conditional sale, the condition being the failure to redeem.<sup>29</sup>

But even this was not adequate protection, and the *lex commissoria* was forbidden by the emperor Constantine, though it is highly likely that, if the form of a conditional sale was observed, it must have been difficult to challenge the transaction.<sup>30</sup> In later times it was possible to make an application to the court to take the property in lieu of the debt at a valuation. This, if granted, discharged the debt and rendered the pledgee creditor liable to the debtor for any excess of the valued *res* over the claim.

The creditor, if he did not in this way foreclose his debtor's right of redemption, had only a power of sale. However, this power was implied, and needed no special agreement to create. In exercising his power of sale, care was expressly taken that creditor should not be the purchaser, either directly or under cover of a sale to a third person.<sup>31</sup>

<sup>28</sup> D. 20, 1, 16, 9.

<sup>29</sup> D. 20, 1, 16, 9; C. 8, 13, 3.

<sup>30</sup> C. 8, 34, 3.

<sup>31</sup> G. 2, 64.

The power of sale was finally hedged in by certain restrictions. It could not be waived, even by express agreement. But it could not be exercised until two years after default, and then only upon notice. At that time, on suit, the *iudex* would set a final time for payment. If payment was not made then, title passed to the creditor.<sup>32</sup>

But, even after this, there was a two-year right of redemption. To be sure, the debtor must offer the debt and its incidental expenses, and the accrued interest, if there had been a stipulation for interest.

If the creditor sold the *res*, he might have a deficiency judgment, if the proceeds were inadequate.<sup>33</sup>

We may assume—as the illustrations in the sources indicate—that these rules grew up in connection with land security. The long period of redemption—more than four years—would seem natural when owners of land are being ousted of their patrimony, and somewhat excessive in the case of ordinary collateral. And when land was used as security the contract was rarely put in the form of a pledge proper, but in the form familiar to us of the mortgage, the *hypotheca*.

## HYPOTHECA (MORTGAGE) AND ITS ENFORCEMENT

70. The *hypotheca* was a pledge, in which the debtor retained possession.

In both pledge and *hypotheca*, fruits might by agreement be taken for interest (*antichresis*) or charged against principal. This held even for damages based on theft of *res*.

Successive pledges and mortgages were valid. Recordation was not constructive notice, but in later law established priority.

<sup>32</sup> D. 13, 7, 4.

<sup>33</sup> C. 8, 33, 3.

Otherwise priority was determined by time. Fraudulent sale or mortgaging was a crime.

The creditor had further two actions *in rem* (available also to pledge): (a) The hypothecary, or quasi Servian, to recover the *res* if it had been disposed of. (b) The interdicts, especially the quasi Salvian.

The difference between pledge and mortgage is that in the *hypotheca* possession remains with the owner, who simply makes an agreement to let it be security for the debt. The name and the institution are Greek, although something like it must have existed in some form in early Rome as well. An old contract, the *fiducia*, could easily serve the purposes of either pledge or mortgage.<sup>34</sup>

A great many of the obligations of the pledge obviously do not exist in this contract, since there is no bailment. But in many matters the two transactions could be treated together.

In either case, the fruits or proceeds of the *res* belonged to the debtor. If the creditor got them, he reduced the debt to that extent, unless he had made a special agreement that the fruits should be applied in lieu of interest. This agreement, called *antichresis*, would obviously be commoner in a pledge.<sup>35</sup>

Even if the profit made was hardly the proceeds of the *res*, the rule above stated applied. If T. stole the *res* from the pledgee, N., and was sued in *furtum* by the latter, as he might be, the damages, which might be double or quadruple the value of the thing, must be charged against the debt. And if the pledgor had stolen it, and been sued in theft, no such computation was made.<sup>36</sup>

Successive pledges of the same *res* were possible and not infrequent. In all these cases, the first creditor had plainly

<sup>34</sup> G. 2, 59. Examples of contracts of *fiducia* have been found in the inscriptions. C. I. L. II, 5042.

<sup>35</sup> D. 20, 1, 11, 1.

<sup>36</sup> D. 13, 7, 22, pr.; 47, 2, 79.

a lien superior to all others. But several mortgages of the same property are particularly frequent, and the rules of priority are in the main those known to the common law.

In the case of successive mortgages, the obvious rule that priority of time conferred priority of right governed. The actual possession of property, and the fact that it was in the hands of a *bona fide* purchaser, apparently had no weight, except to a limited extent. Something like a system of recordation of titles had existed in Egypt, but no attempt was made to apply it generally to the Empire.<sup>37</sup>

However, recordation before public notaries or before witnesses was frequently made. In the year 472, the emperor Leo provided that, if a mortgage were publicly recorded or made before three witnesses, it would have priority over others not recorded.<sup>38</sup> This is only one of the functions performed by modern systems of recordation. The most useful purpose of the latter is to give constructive notice to all the world of the existence of the mortgage. Nothing of this sort was attempted at Rome. We do not know whether the Greek custom of placing mortgage tablets—giving the mortgage and the amount—on the actual land hypothecated, ever existed in the western part of the Empire.<sup>39</sup>

The only check upon a fraudulent mortgagor was his civil and criminal liability to the persons prejudiced. If A. sold or mortgaged his property without disclosing prior mortgages, he might be sued civilly in *dolus* and criminally for *stellionatus* (infra, § 179).

Mortgagees were satisfied in order of their priorities. If a prior mortgagor had the property sold, he would apply the proceeds first to his own debt, and then turn the surplus over to

<sup>37</sup> D. 13, 7, 20, 1; 20, 4, 12; 20, 4, 20.

<sup>38</sup> C. 8, 18, 11; N. 73, 1.

<sup>39</sup> They were wide-spread in the East. Cf., for the entire question of recordation in Greek Law, Egon Weiss, *Griechisches Privatrecht*, i, p. 246 et seq. especially pages 332-333; Aristotle, *Politics*, 1321 b, Newman's Ed., 4, p. 553 et seq.



junior mortgagees. It was only the final surplus that was returned to the debtor.<sup>40</sup>

Mortgages of after-acquired property, floating charges, were valid at Roman law, just as at common law, though the modern civil law generally disapproves of them. In that case, the use of property and its consequent consumption by the mortgagor was necessary, but whatever was left when the mortgagee's right vested was subjected to the mortgage.

The pledge actions, direct and contrary, were not an adequate protection to the pledgee. Both he and above all the mortgagee needed some means of enforcing their lien directly against the *res*, by an action *in rem*. The hypothecary action was decidedly such an action. It was apparently another name for the quasi Servian action,<sup>41</sup> in which the Servian action proper, used by a landlord to distrain for rent against the personal property of his tenant (*infra*, § 88), was taken as a model.

But the quasi Servian action was available for both pledgees and mortgagees. However, if a creditor brought it against a *bona fide* purchaser, he must first have exhausted his remedies against the debtor and his personal sureties.

Just as the quasi Servian action lay in these cases, a quasi Salvian interdict gave the creditor the benefit of this type of possessory remedy. Other interdicts, named and unnamed, would be equally available in specific cases.

## IMPLIED MORTGAGES

71. There were many implied mortgages, most of them to secure the rights of beneficiaries, wife, wards, legatees, or children.

The landlord had a very broad implied mortgage to secure his rents.

<sup>40</sup> D. 20, 1, 34, pr.

<sup>41</sup> I. 4, 6, 7; D. 20, 1, 17; 20, 2, 4.

This type of security, especially to protect fiduciaries, was frequently resorted to in Roman law. The following are frequently cited examples:

(a) A wife had an implied mortgage (*hypotheca tacita*) on all her husband's property, to secure restitution of her dowry on divorce—except for her fault. If the marriage was dissolved by death, her heirs had this mortgage.<sup>42</sup>

(b) A husband had a similar mortgage on his wife's property, if he was evicted.<sup>43</sup>

(c) *Pupilli* (wards) had this mortgage over the entire property of their guardian, for the proper management of the estate.<sup>44</sup>

(d) Legatees had such a mortgage over the property of the *heres* (infra, § 146), for the payment of their legacies.<sup>45</sup>

(e) Children had this mortgage over their father's property, to secure the payment of property coming to them from their mother.<sup>46</sup>

(f) Landlords had a general mortgage, both on the crops of an estate and on all things brought into it (*invecta et illata*). This applied especially to agricultural leases, but a similar mortgage existed on furniture in city leases (infra, § 88).<sup>47</sup>

All these mortgages might be enforced, as any express mortgage might. The rules of priority applied, and the usual actions *in rem* were available.

<sup>42</sup> C. 5, 13, 1, 1.

<sup>43</sup> C. 5, 13, 1, 1.

<sup>44</sup> C. 5, 37, 20.

<sup>45</sup> C. 6, 43, 1; 6, 43, 3; N. 108, 2.

<sup>46</sup> C. 5, 7, 8; 6, 61, 6, 4.

<sup>47</sup> D. 13, 7, 11, 5; 20, 2, 4, pr.; 20, 2, 4, 1; C. 8, 15, 7.

## CHAPTER 9

## INNOMINATE CONTRACTS

## Section

72. Actions *in Factum*.

73. Two Instances of This Action.

74. Exchange.

75. *Precarium*.

## ACTIONS IN FACTUM

72. Many contracts of the form *do ut des*, etc., were not given separate names. In the later civil law, they were called innominate contracts.

The action on them was an action of good faith, and the pleadings recited the facts and asked for general relief, *actio in factum præscriptis verbis*.

In some instances the right to bring even this action was in doubt. In that case *dolus* would lie.

The four "real" contracts, if classified under the types established by Paul, would all be of the form *do ut des*, "I give a *res* in order to receive one," in which B.'s obligation is created by the transfer of a *res*, and consists in transferring a *res*.<sup>1</sup> These "real" contracts have special names and specially designated actions, a fact which means only that the use of these names in ordinary affairs or in legal procedure at once apprises us of the general character of the transaction and of the relief sought for.

But, even if the list had been vastly greater, it could scarcely have been exhaustive, for, as Ulpian said, there are bound to be more types of transactions than separate names for them.<sup>2</sup> Those contracts which receive a name of their own are either

<sup>1</sup> D. 19, 5, 5, pr.

<sup>2</sup> D. 19, 5, 4.

of long standing or of frequent occurrence, or perhaps owe their special designation to purely accidental circumstances.

In constituting a *iudicium bonæ fidei*, an action of good faith, there was no difficulty in dealing with situations which did not fall within the description of any contract with a special name. The demonstration, instead of naming such a contract, had merely to recite the facts on which a demand for relief was predicated, and the *iudex* was instructed to give the plaintiff, if he made out a case, whatever relief he might equitably demand.

An action with such a demonstration was called *actio in factum præscriptis verbis*, "an action with a *formula* specially dictated for the facts in issue."<sup>3</sup> In all of them there was no obligation, and therefore no action could be maintained, unless the plaintiff on his part had actually transferred the thing or actually performed the agreed service. The mere agreement to do so was not actionable.

If we examine the various illustrations given in the Digest of the four types, *do ut des*, *do ut facias*, *facio ut des*, *facio ut facias*, it will be apparent that this general action, which needed no designation, but was adapted specially to each state of facts, was really available only in the first two, in both of which the plaintiff had made a transfer of property upon some promised consideration. In the case of the other two, a particular effort was made to bring it into some other group. Paul unequivocally says that the type *facio ut des*, when A. has performed some act in consideration of B.'s transferring a *res*, there will be no *actio in factum*, and therefore there will be one for *dolus*, since such a failure to perform could not be otherwise than a deliberate wrong.<sup>4</sup>

Of the last class he gives two instances: (1) A. and B. agree that B. is to demand money from A.'s debtor at Carthage, and A. from B.'s debtor at Rome—a transaction like an exchange of drafts at the present day. (2) A. and B. agree that

<sup>3</sup> D. 19, 5; C. 4, 64.

<sup>4</sup> D. 19, 5, 5, 3.

A. shall build on B.'s soil and B. on A.'s soil. In both these cases, it is possible to force the transactions into the category of a mandate (*infra*, § 102); but, since there are certain difficulties here, owing to the special character of the mandate, it was safer to sue *præscriptis verbis*, but to model the *formula* as far as possible on that of mandate. In an earlier fragment, from Pomponius (150 A. D.), an agreement of the following effect is cited: A. agrees to let B. sow in his (A.'s) field and to reap the crop. A. sows, but B. does not allow him to reap.<sup>5</sup> No ordinary action—i. e., *actio civilis*—will lie. Pomponius doubts whether an action *præscriptis verbis* is available. But there will certainly be an action of *dolus*.

## TWO INSTANCES OF THIS ACTION

73. Two common instances of situations on which an *actio in factum* might be based were:

- (a) A bailment for the purpose of appraisal;
- (b) A sale on approval, before approval was indicated.

In most instances, it is true, the transaction will be very close to some very well-known type. In that case the action was said to be modeled upon the well-known one, *ad exemplum*. We have seen how many actions were *in factum ad exemplum legis Aquiliæ* (*supra*, § 49). Similarly, a great many were modeled on sale, hiring, mandate, partnership, the consensual contracts to be discussed later.

There were several transactions in which only an action *in factum* would lie, and which were sufficiently common to require particular description. One was the case in which A. gave B. property, land or chattels, to be appraised by B. There was no difficulty about getting the property back. It could always be recovered in an action *in rem*, vindication, no matter in whose hands it had come, and if B. had fraudulently disposed of it, or deliberately misused it, it was an obvious case

<sup>5</sup> D. 19, 5, 16, 1.



of *furtum*. But suppose the property is destroyed or lost through negligence. In that case A. had the action *præscriptis verbis*, since the transaction was neither *commodatum* nor deposit, although it looked a little like either. But whether B. was liable depended upon the circumstances. If B. had an interest in the appraisal, he was held to *exacta diligentia*, but was not liable for accidental or unavoidable loss. If B. had no interest whatever in making the appraisal, he was liable only for *dolus*, or that reckless neglect which was equivalent to *dolus*.<sup>6</sup>

Again, in the case of sale on trial and approval, the possession of the goods before approval had been indicated was that of a bailee. If, during that time, the articles were lost, or an unexpected profit made out of them, the possessor was liable to the bailor, and, it would seem, held to a standard higher than the usual, since he was liable for loss by robbery, and apparently for other accidental losses. Of course, if he exercised his option of purchase, title vested, and no question of loss or injury or profit in the interval could very well arise.<sup>7</sup>

## EXCHANGE

74. Exchange was by some jurists treated as a kind of sale.

The view which finally prevailed was that it was not a sale, but a special contract, on which the action must be *in factum*.

Finally, there was the contract of exchange, *permutatio*. The recollection that this had been the original form of sale was still strong enough to justify a century long controversy as to whether it was to be treated exactly like a sale.<sup>8</sup> It was finally decided that it was to be considered as a wholly different

<sup>6</sup> D. 19, 3, 1; 19, 5, 13, pr.

<sup>7</sup> D. 19, 5, 20.

<sup>8</sup> G. 3, 141; I. 3, 23, 2; D. 18, 1, 1; C. 4, 64, 7.

contract, following the Proculian doctrine, as opposed to that of the Sabinians. It is interesting to note that, after considerable uncertainty, the American Uniform Sales Act (sections 2, 9), retains the rule of the Proculians and of the *Corpus Iuris*.

Since it was not a sale, it was an unclassified transaction, and its breach could be sued for by an action *præscriptis verbis*. Under those circumstances, as in other contracts of the form *do ut des*, no obligation arose till one side had performed. If N. did not give the other *res* in exchange, as he had promised, A. sued him, not for the return of the *res* he had given—since that he could get in quasi contract—but for whatever damage he had sustained by N.'s failure. Ordinarily, no doubt, the damage could be completely compensated by N.'s performing his side of the exchange, but often other elements had to be taken into consideration.

If N. could not perform because of loss of the *res* by accident, the loss fell on A. In this respect the rule was the same as in sales (*infra*, § 77). And again, as in sale, it was only accidental loss or irresistible force that would excuse him. He was required to use *exacta diligentia*. Finally, the analogy of sale was still further maintained by the ruling that the warranties that went with the goods were those of sale.<sup>9</sup>

### PRECARIUM.

75. A tenancy at will was constituted by delivery of a *res*, with right of recaption at any time in the deliverer (*tradens*). The tenant's obligations were enforceable by an action *in factum*, but he was given possessory remedies against third persons.

Another contract enforced by the *actio in factum* was the *precarium*. This in form is like the tenancy at will of the English system. The obligation arose if and when the tenant

<sup>9</sup> D. 19, 5, 5, 1; 19, 4, 2; 21, 1, 19, 5.

took possession under an agreement to hold until the landlord chose to rescind his license.<sup>10</sup>

The tenant *precario* owed no duty of active diligence, but was liable if he had willfully misused the property. He must restore the *res* on demand. In either case the *actio in factum* lay against him, but in the latter case an interdict was available, since it was a dispute over possession.<sup>11</sup>

He had himself, however, possessory rights available against all who interfered with his possession (particularly the interdict), except that in no case was it available against the person who had put him in possession (*precario tradens or dans*).<sup>12</sup>

<sup>10</sup> D. 43, 26, 2, 2; 43, 26, 3.

<sup>11</sup> D. 43, 26, 19, 2.

<sup>12</sup> D. 43, 26, 8, 4.

## CHAPTER 10

## SALE

## Section

- 76. General Nature of Sale.
- 77. Effect and Subject-Matter.
- 78. Conditions Necessary to Create the Contract.
- 79. A Contract to Sell and a Contract to Labor.
- 80. The Passing of Title.
- 81. Suspension of Title to Protect the Seller.
- 82. The Seller's Obligations.
- 83. Warranty of Quality.
- 84. Lesion.

## GENERAL NATURE OF SALE

76. Sale is of the type *do ut des*. It became, however, a consensual contract, in which, at the moment of agreement, two obligations arose, enforced by two actions, *actio empti* and *actio venditi*.

The rules of offer and acceptance were developed at Roman law in connection with the consensual contracts, of which sale was the most important.

By far the most important of all the contracts of the type *do ut des* was the sale, in which A., the vendor or seller, was required to put N., the purchaser or buyer, in physical possession of some *res*, and N. was required to pay to A. a fixed amount of money. It is not only the most important of all contracts, but it is the first to be considered of those which the Romans called consensual.<sup>1</sup>

In many of the bailments discussed previously, two or more obligations were created. The bailee was obliged to return the *res*, or account for it satisfactorily. The bailor was obliged to compensate the bailee for loss or expenses. But in these

<sup>1</sup> I. 3, 23; D. 18, 1; 19, 1; C. 4, 38; 4, 49.

cases the bailee's obligation is much more important than the other, and, indeed, is the only one that is likely to be in the mind of either party.

But in the sale two obligations were simultaneously created, and both were of equal importance—the seller's obligation to deliver the *res*, *venditio*, and the buyer's obligation to pay the price, *emptio*. The proper name for a sale was *emptio-venditio*, although the use of either half of the compound necessarily implied the other. While the transaction, the contract, was really one, the obligations were quite severable, and the Romans preferred to look at each one in turn. If the contract was broken, the injured party sued in an *actio empti* or *venditi*, depending upon whether he was buyer (*emptor*) or seller (*venditor*).

Both obligations arose simultaneously by the mere agreement of the parties. No external act need have taken place, except communication between the two. In practice this communication generally took the form of an offer which specified both the *res* and the price, and, whenever and however the offer was assented to, the contract was completed, and both obligations came into existence.<sup>2</sup>

The many problems that are connected with offer and acceptance in the common law can arise only in consensual contracts. At Roman law, such problems were fewer, but they did arise, and, since sale is the first of the consensual contracts to be discussed, they may be mentioned here. Most of the rules apply to all the consensual contracts, as well as sale, but they are most easily illustrated in the latter.<sup>3</sup>

In the case of stipulation, the question and answer must follow each other, almost immediately. The transaction is one *inter præsentes*. But sales may be made by communica-

<sup>2</sup> D. 50, 12, 3; 2, 14, 39; 18, 1, 21. The vendor is generally the offeror in the cases discussed.

<sup>3</sup> The relations between the Roman law of sales and the common law has been more fully studied than other branches of the subject. Cf. J. B. Moyle, *The Contract of Sale in the Civil Law*, Oxford, 1892.



tion between parties not face to face, by letter or messenger. And even if the two parties are together, the offeree may leave the offeror and accept after he has returned to him. That is, an appreciable interval must often have arisen between the making of the offer and the indication of assent. How long did the offer remain open? Need the acceptance be completely communicated? Could the offer be withdrawn before the acceptance was communicated? Did this withdrawal, or a rejection, need communication? No distinct answer is given to these questions in connection with sales, from which fact we must infer that these matters had vastly less importance than they possess in a time of rapid communication. If we were to follow the analogy of the most completely consensual of Roman contracts, that of mandate, communication was not necessary for acceptance, rejection, or revocation, and an offer, indefinite as to time, remained open a reasonable time. But neither party could go on with the contract when the other party's dissent had been signified to him, and could sue only for the damage suffered up to that time. To do otherwise would be *dolus*.

### EFFECT AND SUBJECT-MATTER

77. The distinction between a sale and a contract to sell did not exist at Roman law. There were only contracts to sell.

The contract did not convey title, but did transfer risk of loss.

Some limited classes of things could not be objects of sale.

Except for these classes, anything, including future goods, chances, and abstract rights, might be sold.

The first distinction made in modern discussions of sales is between a sale proper and a contract to sell. In the former, title passes to the purchaser, either at once or upon the happening of some future act, without a new act on the seller's part. In the

latter, the seller must perform some additional act in order to transfer the title to the purchaser.

It may be said at once that this distinction did not exist at all in Roman law. All the contracts which we are discussing in this chapter are contracts to sell only. Title can be transferred only by the performance of some further act—generally physical delivery—on the seller's part. If we speak of "sales" at Roman law, we shall therefore always mean contracts to sell, as indeed in the common law the term "sale" is often loosely used to mean both a sale proper and a contract to sell.<sup>4</sup>

But, while at Roman law the contract was ineffective to pass title, it did transfer the risk to the buyer at once. This was a violation of the general rule of both the Roman and English systems that risk follows title, *res perit domino*, and its historical or practical justification need not detain us. But it created a situation which made all Roman contracts of *emptio-venditio* resemble the common-law sale as much as they resembled the common-law contract to sell, and some of the questions that are dealt with in our books in connection with passing of title are of importance in Roman law in regard to transfer of risk.<sup>5</sup>

First of all, there must be a *res*. If there was none in fact, or if it had perished without the knowledge of the parties, there was no sale. Nor, again, if it was property that could not be sold, public property, sacred property, a free man, a dangerous instrumentality, which could be put to no good use, or anything else specially withdrawn from commerce by imperial ordinance or statute, such as royal purple and other dyes and the like. But while the *res* could be none of these things, it might take many forms.<sup>6</sup>

We must keep in mind that the Roman contract covered both real and personal property, that there was no statute like our Statute of Frauds, and that there was no more need of a written deed to transfer land than to transfer chattels. Many of the

<sup>4</sup> I. 3, 23, 3.

<sup>5</sup> D. 18, 1, 35, pr.; 18, 6, 8, pr.; 13, 6, 5, 2; 47, 2, 14, pr.

<sup>6</sup> D. 18, 1, 8, pr.; I. 3, 23, 5; D. 18, 1, 4.

very special rules that govern land contracts at the common law had no reason for existence at Roman law.

As to future goods, the fact that all Roman contracts of *emptio-venditio* were contracts to sell, rather than sales proper, removed a serious difficulty. There was no reason why the unborn young of animals, or future crops of grain, should not be the subject of a valid contract. As soon as the crop came into existence, or the young were born, the risk of loss at once fell on the buyer. But suppose they never came into existence. Then there was no obligation on the vendor, unless it was the vendor's fault—either his *dolus* or his *culpa*—in which case the purchaser could sue *ex empto*. On the other hand, if no young were born or no crops grown, the vendor had no action *ex vendito* for the price or for damages, and the purchaser, of course, had no claim.<sup>7</sup>

The common law recognized such contracts as sales in spite of the difficulties which the vesting of title involved. In such a situation as that of *Grantham v. Hawley*,<sup>8</sup> in which A. sold the tithe wool for years in advance to B. and then the entire estate to C., the decision was that the title to the wool vested in B., although C. had no means whatever of protecting himself. At Roman law title would have passed to C., and B. would have an action *ex empto*, although, if the wool had been destroyed by accident, his action would fail.

The Roman law further recognized sales of a future catch of fish, or the booty of a hunt. This was frankly taken as a speculation. The purchaser was buying a chance, and not a thing.<sup>9</sup> If game was caught, the risk passed to him, and he had a right to its delivery. If none was caught, he had no claim, and no defense to an action *ex vendito*.

That a *res* might be an abstract thing, as in this case, was further evidenced by the sale of public property in which A.

<sup>7</sup> D. 18, 1, 8.

<sup>8</sup> (1616) Hob. 132.

<sup>9</sup> D. 18, 1, 8, 1.

had a right of occupation, as in the market booths of the Forum. A sale of such property was impossible, as far as soil or building was concerned. What A. sold was the right, the *ius*, as the Digest expressly says; but there was no difficulty whatever in calling this a sale.

### CONDITIONS NECESSARY TO CREATE THE CONTRACT

#### 78. Conditions necessary to create the contract:

- (a) Specification of goods. Passing of risk in the case of unspecified goods was governed by rules like those which govern passing of title at common law.
- (b) Specification of price was equally necessary. A reasonable price would not be implied.
- (c) No form was necessary, but in the East written memoranda were common, and generally treated as requisite.
- (d) Earnest money (*arra*) suspended the creation of the contract.

The sections of the English and American Sales Acts, which deal with passing of title to unspecified goods, have parallels at Roman law.<sup>10</sup> A man might sell all the corn in a bin, all the wine in a cask, all the sheep in a flock, at a certain lump price. There is a sale at once. Title passes at common law, and risk passes at Roman law. But suppose he sells it at a fixed price per bushel, per gallon, or per head. The former and present English rule is that title passes when the computation is made. The American rule is that it passes at once. Roman law was like the English rule. There was no sale and no passing of risk until the number of pounds, etc., had been ascertained.

If a definite quantity had been purchased out of an indefinite mass, the rule is the same in all the systems. Title—or risk—

<sup>10</sup> Uniform Sales Act, §§ 6, 19; English Sale of Goods Act, §§ 16, 17.

does not pass until the quantity has been segregated, and it is, of course, indifferent whether the price is a lump sum or per unit.<sup>11</sup>

The *res* being specified, the price must be equally specified. In this there is a sharp difference between the common law and the Roman law. At the common law an agreement to sell and buy ascertained goods was valid as a sale for all purposes, and the buyer owed the reasonable value of the goods. Such an agreement would be incomplete and legally ineffective, at Rome. There was no sale until the price was fixed.<sup>12</sup> It could be fixed by agreement between the parties, no matter how long the bargaining took place, or by the determination of a third person, if such was the agreement; but until it was fixed there was no obligation on either side. It might be indefinite to a certain extent, provided there was a definite minimum. Thus A. might sell his property for 1,000 bs. with certain undetermined additions, depending on future contingencies. The fixed minimum satisfied the legal requirements. Or he might sell to N. for a fixed sum, together with certain services to be performed by N. This, too, was a valid sale, and on a suit *ex vendito* N.'s failure to perform the services may be assessed in damages.<sup>13</sup>

With a determinate *res* and a fixed price, an agreement to sell created reciprocal obligations. As has been said, no written memorandum was necessary, and no further form need be observed. But the eastern part of the Empire had from time immemorial been accustomed to consider a written form the essential part of a contract to sell, and literally thousands of examples have come to us in the form of Egyptian papyri, as well as in inscriptions and literary documents. Further, there was the wide-spread institution of the *arra*, or earnest money, the nature of which was a subject of much controversy. The final regulation of the matter, as it appears in Justinian's Institutes, is as follows: No writing is necessary to create a binding contract of

<sup>11</sup> D. 18, 1, 35, 5.

<sup>12</sup> I. 3, 23, 1.

<sup>13</sup> D. 19, 1, 6, 1; 18, 1, 35, 1; 19, 2, 25, pr.



*emptio-venditio*. If, however, it was part of the agreement that the contract should be reduced to writing, either by the parties themselves or by a public notary (*tabellio*), there is no valid agreement until this is done, and either party may withdraw at will.<sup>14</sup>

Whether the contract was oral, or needed a written form to be complete, the giving of earnest money, *arra*, suspended the creation of an obligation. Either side might withdraw, but, if the buyer did so, he forfeited the *arra*; if the seller did, he had to restore the *arra* and as much again. The situation was something like a paid option, with an analogous privilege granted to the seller.

## A CONTRACT TO SELL AND A CONTRACT TO LABOR

79. Contracts to sell had often to be distinguished from contracts to do work. If these resulted ultimately in the transfer of a *res*, they were sales.

The problem of distinguishing a sale from a contract of work and labor is an important one at the common law in connection with the Statute of Frauds. If A. ordered something from N., to be manufactured from N.'s materials, common-law jurisdictions were sharply divided as to whether it was a sale or not. The English rule, as embodied in *Lee v. Griffin*,<sup>15</sup> which makes it a sale, has commended itself to most writers; but in America there was the so-called "New York" rule and the "Massachusetts" rule. The latter, with some slight modification, has apparently been adopted in the Uniform Sales Act.<sup>16</sup>

Similar refinements in dealing with such a situation were cur-

<sup>14</sup> I. 3, 23, pr.; C. 4, 21, 17.

<sup>15</sup> 1 Best & S. 272.

<sup>16</sup> Uniform Sales Act, § 4. The "New York" rule is laid down in *Parsons v. Loucks*, 48 N. Y. 17, 8 Am. Rep. 517, and the Massachusetts rule in *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112. 1 Williston on Sales (2d Ed.) §§ 54, 55.

rent in Roman law, but by the time of Gaius the weight of authority was inclined to treat the transaction as a sale, and this rule was adopted by Justinian. That is to say, the simple and easily applied rule of *Lee v. Griffin* was also the rule of the mature Roman law.<sup>17</sup> If, therefore, A. ordered a ring to be made by N. from gold belonging to N., the agreement to do so created an obligation, provided the conditions were present—a specified *res*, which in this instance may have been the gold after N. had appropriated it to the contract, and a fixed price. The risk passed at once to the buyer, and N. was under a duty to use due care. It is possible, to be sure—our sources are not quite clear on the matter—that the risk did not pass until the ring was made and put in a deliverable state. That seems, on the whole, less likely.

### THE PASSING OF TITLE

80. Title passed at Roman law, originally by a ritual called *mancipation*, later by delivery.

Apparently the need of determining the exact extent of a citizen's property for census purposes gave the question its chief importance at Roman law.

As has been stated, the questions which at the common law arise in connection with transfer of title are discussed at the Roman law in connection with transfer or risk. But title did pass at a certain time and in a certain way. The matter has often been treated as if it were a question of metaphysics, rather than an issue presented by certain real and quite common situations. What we really wish to know, when we speak of title passing or not passing, is, first, upon whom the risk of accidental destruction will fall, in the absence of special agreement; and, secondly, under what circumstances a second purchaser from the buyer will be protected against an unpaid or defrauded original vendor of the *res*.

<sup>17</sup> I. 3, 24, 4; D. 19, 2, 2, 1.

The first question, as we have seen, was settled at Rome by the rule that the risk passes by the contract. Of course, a specific stipulation could vary it, as, indeed, a specific stipulation could specially provide for any of the elements into which a complicated transaction like sale can be resolved. The second question was also settled at Roman law in a definite way. Title passed by delivery (*traditio*), and when such delivery had taken place the buyer could dispose of the *res* as he chose; and if he transferred it to an innocent holder the original vendor was under a complete disability to regain title.

In very ancient times the transfer of title could not be effected so informally. An elaborate ritual called *mancipation* was necessary, discussion of which must be reserved for a later chapter. Again, in the East, the use of written documents to transfer title was an old and widely accepted form, which the later Roman law treated as an existing and supplementary mode of conveyancing. But the general method was delivery, both in real and personal property, with such qualifications as the nature of the property imposed.

The question of passing title has therefore not quite the meaning in Roman law that it has at the common law, and from a practical point of view not quite the same importance. But it gained an additional importance because of another fact. Most of the Mediterranean communities had been and still were on a timocratic basis. That is to say, political functions and privileges were assigned on a property qualification. This is especially well illustrated in the constitution Solon gave to Athens, and in the Roman system, in which the census classes at all periods of Roman history were fixed by the possession of a certain amount of property.<sup>18</sup> Further, there prevailed in the East the widespread system of liturgies, in which important civic functions—such as erecting public buildings, equipping ships, and the like—were assigned to citizens, assumed to have the means to perform them. It was, therefore, of great moment to know just

<sup>18</sup> D. 50, 15; C. 11, 58.

what property belonged to any person at any particular time, since it was the possession of the property, and not the owner's personal qualifications, that justified the imposition of the public duty mentioned. Indeed, in Athens and perhaps elsewhere, a citizen burdened with a liturgy might challenge another either to assume it or exchange property with the challenger.<sup>19</sup> Perhaps this may account for the fact in many Eastern and Greek-speaking communities, title in sale did not pass even by delivery, but only on delivery, followed by actual payment, since only after payment was there such a redistribution of property as would justify a change in the census and in the public duties such change implied.

In Rome itself there were no official liturgies, except those voluntarily assumed, and no trace of the institution of challenge and exchange. But voluntary liturgies sometimes justified a claim for exemption from other duties, and the elaborate system of compulsory guardianships (cf. *supra*, § 41) was very like a system of liturgies, if not exactly equivalent to one. And when, after the constitution of Caracalla, the majority of Roman citizens were Greek-speaking Orientals, the question of title or official ownership became as much discussed as it had always been in Greek juristic writings.

<sup>19</sup> Demosthenes, in *Phænippum*, *passim*; Lipsius, *Das attische Recht und Rechtsverfahren*, p. 590.

## SUSPENSION OF TITLE TO PROTECT THE SELLER

81. The liens given at common law to an unpaid seller, who had parted with possession, did not exist at Roman law, unless they were especially stipulated for.

There are a few passages, in the Institutes of Justinian and the Digest, which are assumed to have incorporated this Eastern conception into the Roman system.<sup>20</sup> But it really is not necessary to suppose this. It is stated, to be sure, that even delivery will not pass title, unless the price is paid, or security given, or credit extended. But that leaves the situations in which title will not pass by delivery very few indeed. It is hard to see what situations are meant, except the cases in which a pretended buyer acquires the *res* by a trick and absconds. But this is so plainly *dolus* or *furtum* that there surely is no need to invoke a general sales rule concerning title, in order to protect the seller.

Indeed, as far as the protection of the seller is concerned, by giving him a lien, or a right of stoppage in transit, or permitting him to retain a "security" title, matters so frequently discussed in the modern law of sales, the Roman law knows none of these things. We may say that the Roman system did not permit the seller both to have his cake and eat it. If he distrusted the buyer's good faith or solvency, he need not deliver the article until payment was made, or else he could protect himself by some form of personal or real security. But he could not—even by special provision—dispense with such security and still get the benefit of it. It may be doubted whether the devices by which modern business men do this very thing owe their origin to anything else than a rather low commercial morality and the facility of bankruptcy. A Roman vendor, who wished to retain such a measure of control over the thing as is involved in a security

<sup>20</sup> I. 2, 1, 41; D. 14, 5, 18; 18, 1, 19; 18, 1, 53.



title, could not effect it by a sale, although there were other transactions by which he might get a result somewhat like it.

It will be seen that the converse case, in which, in modern sales, the seller transfers title, but retains possession, will not involve any difficulties at Roman law. The situation in our communities is regulated by statutes, which are much alike and are aimed at preventing fraud on innocent subsequent purchasers from the seller. If, after having parted with title to B., A. retains possession and resells the property to X., the title of B. is ousted and vests in X., and B. has a personal action for damages against A. This would follow as a matter of course in Roman law, since, until delivery, B. had no interest in the *res*, except a right to sue A. for failing to deliver it.<sup>21</sup>

### THE SELLER'S OBLIGATIONS

82. (a) To take care (*exacta diligentia*) of the *res* until delivery.
- (b) To deliver the *res* to the buyer and warrant free and undisturbed possession. But he was not liable unless the buyer was actually evicted.
- (c) To pay double damages if an eviction took place (the implied *stipulatio duplæ*).
- (d) In sales of realty, to warrant against incumbrances created by seller, and, if a special phrase was used, to warrant generally against incumbrances.

What was the seller's chief obligation? Not to transfer title, either at once or ultimately, but merely to grant the buyer the free and undisturbed possession of the *res*—*vacua possessio, habere licere*.<sup>22</sup> He must both actively put the buyer in control of the *res* and refrain from any act which prevented the buyer from getting such control. That required on his part a high degree of care between the time of the contract and the moment

<sup>21</sup> The statutes of the various states are fully discussed in 1 Williston on Sales (2d Ed.) pp. 828-972.

<sup>22</sup> D. 19, 1, 3, 1; 19, 1, 11, 2; 19, 1, 11, 13; 22, 1, 4.

of delivery. Not only was he liable if, by any act which could be called willful, he had injured or lost or disposed of the *res*, but his care was somewhat greater than the ordinary *exacta diligentia* of a *bonus paterfamilias*. Losses by theft, which in ordinary cases would not be imputed to a very careful person, were imputed to him. He could by agreement or stipulation extend or diminish his responsibility, but he could not, of course, contract himself out of his liability for *dolus*.<sup>23</sup>

But, since he promised no title, he was not liable if it turned out that the title was defective. If a third person asserted a paramount title, the buyer must promptly notify the seller and call upon him to defend the action. A failure on the seller's part was a violation of his duty to see to it that the buyer had the enjoyment which he bargained for. But, unless the buyer gave such notice promptly, he could maintain no action *ex empto*, and, if he abandoned the property before the seller had defaulted in his duty, he was equally without remedy. The seller, that is to say, guaranteed the buyer against eviction; but he was not liable under his guaranty until the eviction took place through his failure to prevent it. In that case the buyer's relief was, not the price he had paid, but the loss he had sustained, since the action was one of good faith. The damages might be much larger or smaller than the price.<sup>24</sup>

The buyer could, by stipulation, secure a fuller and more readily calculable protection. He might stipulate for security against eviction.<sup>25</sup> Further, it had become extremely common to add to every contract of sale a stipulation of liquidated damages amounting to twice the purchase price, the *stipulatio duplæ*. So common was this stipulation that in sales of a valuable *res*—how valuable was a matter of judicial discretion—such a stipulation would be implied.<sup>26</sup> However, this was only in sections in which the *stipulatio duplæ* was in frequent use.

<sup>23</sup> D. 18, 1, 35, 4; 19, 1, 36.

<sup>24</sup> D. 41, 3, 23, 1; 21, 2, 16, 1; 21, 2, 53, 1; C. 8, 45.

<sup>25</sup> D. 21, 2, 69, pr.

<sup>26</sup> D. 19, 1, 3, pr.; 21, 2, 2; 21, 2, 37, pr.; 21, 2, 76; C. 8, 45, 6.

The liability, when the stipulation was actually made, was slightly different from the case in which it was only implied. The difference may be seen from an example. A. has sold N. property which really belonged to X. The latter notifies N. that he may keep it as a gift. If there was a stipulation, which is an action of strict law, N. cannot recover double the price he has paid. But if there was no stipulation, as liquidated damages for the defective title, N. can get his loss from A. in an action *ex empto*, since this is an action of good faith, and it is unconscionable that N. by A.'s fault should have been compelled to pay for what he might have obtained gratuitously.<sup>27</sup>

If realty was sold, there was no covenant against incumbrances or claims by paramount title, unless it was specially provided for by the agreement. That was ordinarily done by a common phrase added to the description of the property—*ita ut optimus maximusque*; i. e., “the land in the best and most extensive condition of which it is capable.” An omission of the *formula* promised the property as it was at the time. But even here there was a warranty against incumbrances made or suffered by the seller, like the implied warranties in grant deeds in many American jurisdictions.<sup>28</sup>

### WARRANTY OF QUALITY

83. (a) Caveat emptor did not prevail in the later law.
- (b) There was an implied general warranty that the article was free from defects of any kind. This warranty supplemented express warranties.
- (c) If the warranty was broken, the purchaser had his choice of remedies:
- (1) If sued in an action of sale, *ex vendito*, he might plead the breach as defense *pro tanto*;

<sup>27</sup> D. 21, 2, 9.

<sup>28</sup> D. 18, 1, 59.

- (2) He might rescind the contract and recover the price paid, *actio redhibitoria*, outlawed in six months from the time the contract was made;
- (3) He might sue for damages for breach in the *actio quanti minoris* (*æstimatoria*).

Probably the most characteristic of the duties of the seller at Roman law, when they are compared with those of the common law, was the general warranty of quality, which was implied in all sales. The warranty was already of old standing in the third period of Roman law. It has not been introduced all at once, did not develop all at once, but had gradually grown up in the course of market supervision, which certain Roman magistrates, the *ædile*, had exercised from time immemorial.<sup>29</sup> The evil and cynical rule of *caveat emptor* was abrogated, in practice and in law, at Rome some time before the Christian era; nor need we ascribe the implied warranties that negative *caveat emptor* to any loftier source than the common sense of merchants. The law in this respect was administered with a reasonable regard to business convenience, and, precisely as in the common law, can be really understood only in connection with the hundreds of cases cited in the Digest.

The implied warranties dealt with freedom from those defects which were of frequent or ordinary occurrence in various classes of commodities. The existence of special qualities could, of course, be part of the bargain, and at a very early time, without stipulation, and without any other device for creating an obligation, a statement in regard to a thing, warranted that the quality existed, and was actionable, if false.<sup>30</sup> If we remember that in *Chandelor v. Lopus*,<sup>31</sup> in the early part of the seventeenth century, and for at least one hundred years thereafter, the use of the hieratic words "I warrant" was essential at common law in order to bind the seller, we may estimate by

<sup>29</sup> D. 21, 1; C. 4, 58.

<sup>30</sup> D. 21, 1, 17, 20.

<sup>31</sup> (1625) Cro. Jac. 4, 79 Eng. Rep. 3.

that fact the degree of commercial development which Rome had attained in the first pre-Christian century.

The Roman courts, however, showed an indulgence to commercial weakness similar to that exhibited by our own courts. There was a difference between "puffing" and words that imported a warranty. The test, of course, was the impression produced on a reasonable auditor, and we may be sure it was not always easy to distinguish what was said or promised, *sic ut præstentur*, "so that it was to be made good," from what was meant as a mere vaunt, *sic ut iactentur*, "so as to show off." <sup>32</sup>

In the case of an express warranty, it was understood that the warranty did not cover patent defects, just as the rule is at common law. But the general implied warranty of quality required the goods, not only to be free from defects, but to have those qualities which, under the special circumstances surrounding the sale, a reasonable man would suppose the article to have.

If the warranty was broken, there were several possibilities. The buyer—and this was the general rule—might within six months rescind the contract, restore the *res*, with all its profits and accessions, and demand the return of his purchase money. It was in effect a *restitutio in integrum* (supra, § 23), and was so treated. This was called the *actio redhibitoria*, and it was available, not merely to the buyer, but to his successors in interest, between whom and the seller there was no privity of contract at all. The implied covenant followed land and movables equally.<sup>33</sup>

At the end of six months and within a year, or if for any reason the *actio redhibitoria* was not available or desirable, the buyer might sue in the *actio quanti minoris* (*æstimatoria*) for the damages occasioned. Ordinarily the damages would be the difference between the price and the value of the inferior or injured goods actually delivered, but there might be other ele-

<sup>32</sup> D. 21, 1, 18; 21, 1, 19.

<sup>33</sup> D. 21, 1, 21, pr.; 21, 1, 23, 7; 21, 1, 31, 2; 21, 1, 25, 10.



ments entering into the calculation which the *index* might consider as required by good faith.<sup>34</sup>

Finally, in an action *ex vendito*, breach of the warranty of quality—express or implied—was a defense for the buyer *pro tanto*. The damages which an unpaid vendor sought would regularly be the price, with interest from default. If he had broken his warranty, the damages caused by the breach would necessarily be estimated in calculating the relief to which the vendor was *ex fide bona* entitled.<sup>35</sup>

## LESION

84. Lesion (*læsio enormis*) was the rule, established very late, that a seller could rescind a contract if he had received less than half its real value (*iustum pretium*).

As a general principle that unconscionable contracts cannot be enforced, lesion has been adopted in most modern Codes.

Need for certainty of the terms made stipulations and written memoranda quite general in connection with sales.

A curious and late development was the principle of lesion (*læsio enormis*), introduced, according to our texts, by Diocletian (293 A. D.). This provided that, if the vendor had received less than half the value of the thing, he might rescind the sale, unless the buyer was willing to pay the difference.<sup>36</sup> It is quite generally believed that the rescript containing this provision is interpolated, and that the institution is a creation of Justinian. The evidence for this is somewhat stronger than that which is offered for other alleged interpolations; but it is far from conclusive, even here. The position of the sen-

<sup>34</sup> D. 21, 1, 43, 6; 19, 1, 13; 21, 1, 18, pr.; 21, 1, 19, 6; C. 4, 58, 2.

<sup>35</sup> D. 19, 1, 11.

<sup>36</sup> C. 4, 44, 2. Cf. D. 4, 4, 16, 4.

tence—and it is only one sentence which establishes the doctrine—is suspicious. It comes at the end of a constitution which would lead us to expect a wholly different conclusion. There is no mention of any such idea in the Theodosian Code, which is later than Diocletian. At any rate, it is a late and ill-advised principle. Except for articles that have a market value, the determination of a *iustum pretium* is peculiarly difficult, if not impossible, and it is precisely in things which have no market value that there is most occasion for a complaint on the score of lesion. Further there is no very good ground for confining lesion to a suit by the vendor. Yet it seems quite certain that it was so confined, and that a purchaser who had paid or promised to pay more than twice the value of the article had no analogous power. Further, it is asserted by the commentators that lesion is applicable only to immovables, and not to movables.<sup>37</sup>

However, in spite of its imperfections, lesion not only was adopted in all modern civilian systems (French Code Civil 1674–1683), but became the means of testing the validity of contracts generally by their fairness, a principle embodied in the German Civil Code (section 138) and the Swiss Code of Obligations (section 21). Such a test is no more difficult to apply in law than in equity, where it has long been established in our system. As the Romans applied it, it was a clumsy and inadequate way of reaching this result. In modern courts, in civil-law countries, it invests judges with a discretion not very likely to be abused, but sufficient to act as a deterrent to the grosser forms of economic exploitation. It is generally treated as analogous to the prohibition of usury in loans of money, and in the German Code the two concepts are fused. Usury in loans and lesion in contracts are both to be determined, not by their exceeding a definite amount, but by proof

<sup>37</sup> Cf. the discussion in Moyle, *Contract of Sale at Civil Law*, 186; Solazzi, *L'origine storica della rescissione per lesione enorme*, *Bollettino del Istituto del Diritto Romano*, XXX, pp. 51–87.

that an undue advantage had been taken of the obligor, when the contract was entered into.

It need hardly be pointed out that the transaction of sale is a flexible one, particularly dependent on local custom. As it is *bonæ fidei*, neither side can claim what a reasonable man ought not to expect; but a reasonable man at Rome, as in England, was held to know that market transactions are in part, at least, competitive contests of wits. Something of the ferocity of the competition was removed by the methods indicated, but in both systems the safest and most certain methods of securing any advantages or avoiding any dangers in a sale was to make the terms of the contract, as fully as was feasible, explicit terms of the bargain. Overprudent merchants might insist on stipulations, but this soon became unnecessary, and mere formless pacts were sufficient.

That the rules of sales covered such diverse things as sales of land and sales of merchandise had an advantage in such a society as the Roman, in which population was inclined to be settled. If population had been as shifting as it is in America, sales of land would both have become much more frequent and have demanded greater security for the buyer than possession of the vendor at the time of the sale, even assisted by a short prescriptive period. Hellenistic Egypt had a system of land registration that might easily have spread through the Roman world.

## CHAPTER 11

## HIRE

## Section

- 85. Requisites and Types of Contracts of Hire.
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- 87. Some Special Situations.
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- 89. *Emphyteusis* and *Superficies*.
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- 94. Special Liability of Carriers, Innkeepers, and Stable Keepers.

## REQUISITES AND TYPES OF CONTRACTS OF HIRE

85. The contract of hiring, *locatio conductio*, like sale, demanded a specified *res* and a fixed money consideration, *merces*. It arose when agreement was reached on these two matters.

There were three types: (1) *l. c. rei*; (2) *l. c. operarum*; (3) *l. c. operis faciendi*.

The same agreement might involve several types.

A contract very similar to sale was that of letting and hiring, *locatio conductio*, and, just as in sale, we may use the term "hire" to imply both sides of the transaction, reversing the Roman usage in this instance also.<sup>1</sup>

Like sale, it demanded a determined *res*, which in this case was very frequently an abstract complex, rather than a concrete, object. It demanded a fixed money consideration, called the *merces*—"hire" in the more limited sense of the common law; and, as in sale, the moment at which the agreement was

<sup>1</sup> I. 3, 24; D. 19, 2; C. 4, 65.

reached was held to be the moment of determining the *merces*. Just as in the case of sale, it might be agreed that the *merces* should be fixed by a third person. In that case the obligations arose when it was so fixed, and not until then. If the hirer had already been in possession of the property, and the *merces* was subsequently fixed, it did not relate back, and the lessor had at best a quasi contractual remedy for use and enjoyment. Obviously the *res* must already have been agreed upon. The rules of mistake, fraud, duress, offer, and acceptance were obviously the same in this consensual contract as in the one already considered.

The types of letting-hiring may be seen from the following illustrations:

(1) *Locatio conductio rei*. A. leases his land to N. for 10 years at a yearly rental of 100 *aurei*. A. hires his horses to B. for a month for 10 *aurei*.<sup>2</sup>

(2) *Locatio conductio operarum*. A. agrees to work for N. for a month for 10 *aurei* as compensation. This is our common contract of labor. The services were the *res*. The employee was the *locator*, the "letter," and the employer the "*conductor*," the "hirer." This terminology is still in use in the common law, where the expression "to hire workmen" is quite usual.<sup>3</sup>

(3) *Locatio conductio operis faciendi*. A. engages N. to have some work performed with or without any personal services on his part. Many—indeed most—construction contracts are of this sort and nearly all contracts of carriers. The *res* is the job to be completed. But in this case the person desiring the work to be done is the *locator*, and the "contractor" is the *conductor*.<sup>4</sup>

It might frequently happen that several contracts of *locatio conductio* would be entered into simultaneously. A master of a ship, who owned his vessel, undertakes to transport freight from Rome to Alexandria. As to the ship he might be the

<sup>2</sup> D. 19, 2, 3, 5; 19, 2, 24.

<sup>3</sup> D. 19, 2, 38, pr.; 19, 2, 19, 9.

<sup>4</sup> D. 19, 2, 36; 19, 2, 22, 2; 19, 2, 30, 3.



*locator*, if he puts it completely at the disposal of the consignor. He might further hire out his own services—or those of a slave as pilot—in which case he would be the *locator operarum*; and finally he might undertake the whole task of conveying the goods, as the *conductor operis faciendi*—the *opus* in this instance being the transport of the goods. It really would make little difference just which of these contracts, or which combination of them, we find present. The liability would be the same in every case, and maritime engagements of this sort were much older than the development of any special name for the contract involved.

Although the Roman system does not make the distinction between realty and personalty—or even between movables and immovables—a basic one in the discussion of any contract, it is almost impossible to disregard it in the contract of *locatio conductio*. The illustrations given in the Digest show how large a part land leases played in Roman economy—both leases of houses and of agricultural land—and how special were the rules that applied to them. We may therefore deal with such leases under a separate head.

## LEASES OF LAND—LANDLORD AND TENANT

86. Leases of lands were subjected to special rules.

A lease was always a personal contract, never the granting of a term. The lessee had no interest in the land itself.

A lease was abrogated by sale of the premises. The lessee had only a personal action of damages against the landlord.

The landlord guaranteed quiet enjoyment, and must keep the property in a tenantable condition. In the case of total failure of crop, he must remit the rent in whole or in part.

The tenant was bound to use the land in a husbandlike way and to make trifling repairs.

Improvements accrued to tenant, who also had the right of subletting.

Specific agreements might modify all these rules.

In the lease of a house, the *locator* had no special designation, but the *conductor* was generally called *inquilinus*, "tenant";<sup>5</sup> in the case of agricultural land, the *conductor* was termed *colonus*,<sup>6</sup> "farmer." The money consideration, instead of being merely *merces*, had the particular designation of *pensio*.<sup>7</sup>

It was a consensual contract and one of great importance; but, while contracts of sale were almost infinitely various, leases of houses and farms were likely to be closely similar to each other. A great many elements were so usual that they would be implied in normal cases, and this implication was one of fact, and actually represented what might reasonably be supposed to be the intention of the parties. It was a comparatively simple matter to vary the normal elements by express agreements, which in no case needed a formal stipulation, both because the contract was consensual and because its obligations were to be interpreted *ex fide bona*.

At the common law, a lease gave an estate for years to the lessee—at any rate for a limited and determinable time. In many American jurisdictions that situation has been changed, a lease is treated wholly as a contract, and the lessee is not considered the owner of a term, in any larger sense than the owner of any other contractual right might be so considered. The difference in point of view is illustrated by the situation created when the leased property is destroyed. At common law, the tenant was still under a duty to pay the reserved rent, since he was still the owner of his limited estate and must bear accidental loss, even such loss as rendered the land of little value to him. If the lease is a contract, however, the destruction of

<sup>5</sup> D. 19, 2, 19, 4; 19, 2, 24, 2; 43, 17, 1, 1.

<sup>6</sup> D. 19, 2, 24, 2; 19, 2, 25, 1.

<sup>7</sup> D. 12, 6, 55; 7, 1, 59, 1; 5, 3, 27, 1.

the subject-matter of the contract is a ground for discharging the obligations on both sides.

At Roman law, the situation was never in doubt. A lease was a personal contract, never the transfer of a limited estate. The tenant got no interest in the *res* itself, and the landlord's breach was merely the basis for an action in damages. Consequently, if the property was destroyed, the contract was discharged. But the Roman courts were more consistent in applying this doctrine than many American courts have been. Since the discharge was mutual, the lessor might recover in an action *ex locato* the unpaid rent for such part of the term as the tenant had actually enjoyed, and the *conductor* could recover in an action *ex conducto* whatever rent he had paid in advance beyond the date of the destruction. Similarly additional losses would be equitably adjusted.<sup>8</sup>

Just as accidental destruction was a test of the theory of leases, so sale of the leased premises was such a test. Both in England and America, if A. leases to B., and subsequently sells to C., the latter takes the premises subject to B.'s lease. That is evident enough when the lease is the demise of a term, but is scarcely consistent with the doctrine that a lease is a contract. The Romans followed that doctrine consistently. In the case given, C. would take the premises and could oust B., leaving him merely a personal action against A.<sup>9</sup> This rule expressed in the form "Sale breaks lease"—"*Kauf bricht Miethe*"—became the general doctrine of Continental Europe, despite its inconvenience, and it was not till the establishment of the German Code that a serious attempt was made to abrogate it.<sup>10</sup>

The obligation of the landlord in general was to guarantee quiet enjoyment. Therefore in the case of total or partial destruction, or of irresistible force, act of God, act of the public

<sup>8</sup> D. 19, 2, 30, 1; 19, 2, 34.

<sup>9</sup> D. 19, 2, 25.

<sup>10</sup> Oertmann, *Recht des Bürgerlichen Gesetzbuches*, Schuldrecht, II, pp. 50, 51.

enemy, and so forth, he had failed to perform his part, although it would have been inequitable to penalize him otherwise than by partial or complete rescission. No care or diligence on his part to avert the accident could help him. To be sure, either side could by appropriate pacts vary the situation. The tenant could bind himself to pay rent without reference to destruction of the premises. The landlord could absolutely insure the land or buildings.<sup>11</sup>

In the case of sale of the land, on the other hand, the landlord was obviously liable. He could free himself, if he arranged that the purchaser should permit the tenant to remain, with or without attornment to the new owner.

It was only when there was an actual eviction, or an interference which could be traced to the landlord's omission or commission, that the tenant could complain. If a total stranger evicted him by force or darkened his windows by building close to him, he could call upon the landlord for redress, and it was the landlord's failure to take the necessary steps, rather than the eviction itself, that made him liable.<sup>12</sup>

A. might have leased to B. the property of X.; but, if X. takes no steps in the matter, B. owes rent to A. Even if X. gives or devises the property to B., A. may claim rent up to the day on which B. acquires the property for himself.

Just as he must furnish the tenant the power of entering on the land, so equally the landlord was bound to keep the property in such condition as to render it fit for the tenant's use; but this obviously did not include trifling repairs, which the tenant ought to make for himself.<sup>13</sup> Especially in the case of agricultural property, the terms of the landlord's engagement, unless varied by express agreement, were created by custom and equity. It was assumed that a farm, when leased, would contain the equipment necessary for its being worked. The owner bore the loss in whole or in part, if the damage was

<sup>11</sup> I. 3, 24, 5; D. 19, 2, 11, 1.

<sup>12</sup> D. 19, 2, 30, pr.; 19, 2, 25, 2; 19, 2, 57.

<sup>13</sup> D. 19, 2, 27.

caused by an act of God, by earthquake or storm, or by noxious animals or insect pests, but not if the damage was caused by the forage of a passing army, except in case of hostile invasion. If there was a blight, which destroyed the whole crop, he could claim no rent; and, if there was a complete failure, he owed his tenant a remission. This remission, however, might be recovered, if subsequent years showed a productivity greater than the average.<sup>14</sup>

If the case was of a dwelling house, the lessor had an extraordinary privilege, which seems strange enough to us, but which the relative scarcity of houses in large cities sufficiently explains. The landlord, who needed the property for his own dwelling, could terminate the lease upon an equitable adjustment of the rent actually paid or due. But it must be a real need—not a pretext.<sup>15</sup>

The tenant, on the other hand, was bound to use the land in a husbandlike way, not to injure it by excessive or improper cultivation, and to give timely notice of being ousted, or of loss which the landlord was to repair. Abandonment from unreasonable fear of injury rendered him liable. If injury was caused by third persons, for which the tenant was in any way responsible, such as by a neighbor who had a personal quarrel with the tenant, the tenant was also liable.

Any improvements made accrued to the tenant. He might remove them when his term was over, but he must do it in such a way as not to injure the freehold. The landlord could insist on security being given him by prætorian stipulation (cf. *supra*, § 57).<sup>16</sup>

The tenant, however, took the risk of *damnum seminis*; that is, if the failure of the crop was in whole or in part due to the poor quality of the seed sowed, or if it was due to the natural cessation of productiveness, when vines and trees became very old.

<sup>14</sup> D. 19, 2, 25, 6; C. 4, 65, 8; 19, 2, 15, 2.

<sup>15</sup> C. 4, 65, 3.

<sup>16</sup> D. 19, 2, 19, 4.



The tenant had the right of subletting the premises—unless it was specially denied in the lease—if such a privilege might be inferred from the surrounding circumstances. In that case, if the landlord breached his agreement, the tenant could claim as damages the rent he would have obtained from a sublease already made.<sup>17</sup>

Leases of tenement houses obviously carried the privilege of subletting. As the literary sources of Roman history abundantly show, these buildings were often crazy structures, poorly built and frequently destroyed. In some cases, demolition was required, as when collapse was threatened. Under those circumstances, the tenant could claim as damages the difference between the rent owing the landlord and the total rent due to the tenant from his subtenants up to the day of destruction. But, if the owner demolished the building in order to erect a better one—the only other case in which such demolition was legally permitted (cf. *infra*, § 123)—the tenant might claim the total damages caused by the loss of the rents of his subtenants.<sup>18</sup>

### SAME—SOME SPECIAL SITUATIONS

87. The contract was always determined by equitable considerations.

Hold-overs were presumed to have renewed the lease.

Contracts for cultivation created an obligation to till the soil.

The lease was sometimes used to effect the purpose of a purchase-money mortgage.

If we consider the general attitude which these particular decisions indicate, it will be seen that, if any one was favored by the law, it was the tenant. This is particularly evident in the case of agricultural leases, in which the remission of rent

<sup>17</sup> D. 19, 2, 48, pr.

<sup>18</sup> D. 19, 2, 30; 19, 2, 58.

for failure of crops and the tenant's right of removing improvements—not merely trade fixtures—are striking departures from rules which are familiar to us at the common law. From many of the burdens which the landlord bore at Roman law he could relieve himself by special agreement, and these agreements were interpreted in a reasonable manner. The following case will illustrate:

A. has leased an estate to B., with the provision that B. was not to sublet it. On breach, A. had the right of re-entry and reletting the property. If the new lease was for a smaller rent, he was to recover the difference from the tenant. Suppose, however, the new rent was greater; could the tenant then recover the difference? Nothing had been expressly provided for this situation. It was held that he could not, since it was not reasonable to suppose that such a result was intended, or that a breach of the tenant's covenant should under any circumstances entitle him to recover damages.

Hold-overs were dealt with somewhat as they are at the common law. Here again the contractual character of the transaction was not lost sight of. If a tenant held over, the landlord could elect to treat him as having renewed the lease. But if at the time the landlord had died, or become incompetent, no such presumption of a new contract could be indulged in, and no new lease existed, unless it was made by the heir or guardian of the former landlord.<sup>19</sup>

A late constitution gives both landlord and tenant a year in which either may without liability rescind the contract. But this can be specifically avoided by express agreement.<sup>20</sup>

A special kind of contract—also called *locatio* at Roman law—was the contract of cultivation. A. agreed with B. that the latter should cultivate A.'s farm and pay A. a certain sum for the privilege. This is different from a lease since B. was under a positive obligation to cultivate the land, as well as to pay the rent. Curiously enough, if A. died, B. had the option of

<sup>19</sup> D. 19, 2, 13, 11.

<sup>20</sup> C. 4, 65, 34.

declining to cultivate it, but apparently was still obligated for the rent.<sup>21</sup>

The lease contract was occasionally used to fulfill the purposes of a purchase-money mortgage. If A. sold an estate to B., he might allow B. immediate occupation, with the understanding that until the price was paid B. was to be merely a tenant, and not obtain title till payment. If B. was already in default on the sale contract, A. could permit him to remain there as a tenant by sufferance, in which case he could eject him at any time. But, if a fixed rent had been agreed upon, apparently the amount paid after default could be counted against the purchase price, if the latter was finally paid and accepted.<sup>22</sup>

#### SAME—SECURITY FOR RENT

88. There was an implied mortgage on all the personalty brought on the estate (*invecta et illata*) to secure the rent, enforced by Servian action and Salvian interdict.

The *colonatus*, which grew into serfdom, was an Eastern institution brought into the frame of this contract.

One of the most striking incidents of the lease—especially in farm property—was the implied mortgage the landlord had on movables brought upon the farm, the *invecta et illata*. It compensated the landlord for the general tendency to interpret the contract for the tenant's benefit. Indeed, security for rent must have been very prominently in the minds of landowners, since we hear of specific articles pledged for rent and personal security added, so that in some cases the landlord was triply secured against loss of rent.

This implied general mortgage on all personalty brought upon the estate has a certain analogue in the common-law privilege of distress for rent. The fact that the landlord could dis-

<sup>21</sup> D. 19, 2, 32.

<sup>22</sup> D. 19, 2, 21.

train gave him in effect a lien upon the household goods in the leased premises but it applied only to goods there at the time of default. The Roman implied mortgage attached to personality just as soon as it was brought upon the premises, just as in the case of a mortgage on after-acquired property at the common law.

The mortgage on the *invecta et illata* was specially protected. If the property had come into the hands of a third person, the landlord could have it applied to the satisfaction of his claim by an action called the Servian action, after the prætor who first introduced it. This action was available against the tenant who attempts to resist distress. Further, by a special interdict, called the Salvian interdict, the landlord's possessory interest in the property was given the protection of this form of procedure which in spite of its complications was apparently a great advantage (cf. *supra*, § 23).<sup>23</sup>

How the *colonus*, the free contractor of the *locatio conductio*, changed into the serf of the later Roman law, bound to the land and forced to labor upon it, cannot be discussed here. The contract, *locatio conductio fundi colendi*, already mentioned (cf. *supra*, § 85), involved—what the ordinary lease of land did not—a positive duty to cultivate the land; but the serf *colonus* was doubtless a transfer to the Empire generally of an ancient institution, developed chiefly in Egypt. The Digest ordinarily deals with the contract as though it were freely made, but many of the cases are apparently instances in which the *colonus* is born into a status which he has no power to change, and some of the benefits the law allows him are obviously palliatives, without which an oppressed class could scarcely have survived at all.

<sup>23</sup> I. 4, 6, 7; 4, 15, 3; G. 4, 144, 147.

SAME—*EMPHYTEUSIS* AND *SUPERFICIES*

89. The long-term lease of land (*emphyteusis*) or of houses (*superficies*) was intermediate between sale and hiring. The tenants secured possessory rights in the *res*.

The contract was finally made a special kind, subject to special rules.

There were two leases of so special a type that they could scarcely be governed by the ordinary rules, particularly if the lease was to be consistently treated as a contract. These were the long-term leases—one hundred years and more—whether of land or buildings. They seem in both cases to have grown out of the need of developing state property, in which the title permanently remained with the state or the municipality, but which neither could properly exploit.

In the case of buildings—generally on public soil—the tenant had usually constructed the edifice himself. He paid a rent, probably very small, called *solarium*, and was permitted to treat the interest he possessed, called *superficies*, as actual property of his own. He had actions, based on vindication of the interdicts, to recover possession or to protect himself. He could alienate and bequeath his interest, or incumber it by mortgages and liens. At a relatively early time, not merely public corporations, but private persons, could establish a *superficies*, and it retained enough of its origin that it could be established by mere agreement, since it was essentially the consensual contract of *locatio conductio*.<sup>24</sup>

Land belonging to cities, *ager vectigalis*, had similarly been rented to private persons on long leases. Here, again, the need had been felt of dealing with these leases, not as mere contracts, but as establishing a property right in the *res*. In the Eastern Greek cities, this lease, called *emphyteusis*, was fully developed, and the difficulty of determining whether an *emphy-*

<sup>24</sup> D. 43, 18, 1, pr.; 39, 1, 3, 3; 39, 2, 9, 4.



*teusis* was a lease or a sale had exercised Roman jurists for a long while. Finally, just before Justinian, the emperor Zeno had decided that the *emphyteusis* was neither the one nor the other, but a transaction of a special kind, governed by special rules.<sup>25</sup>

The tenant, *emphyteuta*, paid a ground rent, *canon*,<sup>26</sup> which must not be three years or more in arrears. Otherwise the lease could be canceled. He was relieved from all obligations if the land was completely destroyed, but not if it was partially destroyed. Obviously all risks of loss by bad crops, plagues, and natural calamities was borne by him.

The *emphyteusis*, like the *superficies*, could be freely alienated or incumbered. The *emphyteuta* had full possessory and proprietary remedies, although in every case they were adapted ones.

## LEASES OF PERSONALTY

90. The general rules which governed obligations of letter and hirer in realty applied to leases of personalty as well.

If the *res* was willfully misused by the hirer, the letter had a choice of the action *ex locato*, *furti*, or on the *lex Aquilia*.

The contract of *locatio* in the case of personalty had the general characteristics already described in the lease of land. The special elements which custom and public policy had introduced into leases were, of course, lacking; but the rules governing the duties of hirer and lessor, the lack of any interest in the *res* on the hirer's part, the duty of care, the creation of the contract by the determination of the price, the guaranty against actual eviction, but nothing short of that—in all these respects, the hirer of a movable was in about the

<sup>25</sup> I. 3, 24, 3; C. 4, 66, 1.

<sup>26</sup> C. 4, 66, 3.

same position as the lessee of land. Obviously the various remissions due to failure of crop, the implied mortgage, etc., had no corresponding incident in this form of hiring.

If the article deteriorated through unavoidable causes, the loss was the hirer's. But, if it was defective when it was hired, the loss was the letter's even though he was totally ignorant of the defect. In the case of culpable injury to the *res*, or a wrongful use of it—the cases generally speak of slaves—there was generally a choice of actions. The lessor could sue, either in the action *ex locato*, or in conversion (*furti*), or in the Aquilian action. But he must make his election, and could not sue twice, although the basis of recovery was quite different in the tort actions.

An illustration of the application of *bona fides* to these contracts may be seen from the following cases:

A. owned a slave, X., who was a mule driver. B. hired X., by name, from A. Through X.'s carelessness, one of B.'s mules was injured. A. is not liable, unless he has specifically assumed this risk. But, if B. had requested a mule driver from A., without mentioning X., and A. had sent X., A. would be responsible for any negligence or incompetence on X.'s part.<sup>27</sup>

## LABOR CONTRACTS

91. Labor contracts were classed as *locatio conductio operarum*. The workman was the letter; the employer, the hirer.

A contract to get a definite task done was called a *locatio conductio operis faciendi*. Generally, in these contracts, competence was warranted.

The second type of contract, *locatio conductio operarum* (cf. supra, § 85), is our ordinary contract of labor.

In a slave-holding society, labor contracts can have only a

<sup>27</sup> D. 19, 2, 60, 7.

minor importance. They were not wholly insignificant. Free labor played a real part in the general economy. Obviously, however, we need look for nothing like the development of modern labor law, with its engrossing social and political implications. Even the first of the great modern Codes, the French Civil Code of 1804, seems to contemplate no problem that could not be settled in the frame of the Roman contract of *locatio conductio operarum*.

At Roman law, most contracts that we class as labor contracts would generally fall into the third class, *locatio operis faciendi*, in which the work is to be done in connection with a specific *res*, and is of a specially determined character. Many of these contracts involved a greater liability on the conductor—the laborer—than the obligation to use care. If the work required skill, he was assumed to have it, and errors of workmanship made him liable in damages, even though he had exerted himself to the utmost.

Many of these contracts were building contracts. In some cases it was evidently usual to let out the contract of building completely, the *conductor* ("contractor") having to furnish material and labor at his own expense. No amount of care would excuse him, if a completed edifice was not the result of his labors, and title passed on completion to the *locator* or employer.

## TRANSPORTATION CONTRACTS—CARRIERS

92. Transportation contracts were of considerable importance at Roman law. The carrier was nearly always an independent trader as well.

He was held to an especially high degree of diligence.

But the most important general class of such contracts were contracts of carriage or transportation. These had a history of their own in the Mediterranean, particularly the contract of marine transportation. And although they were of the utmost importance, and we can scarcely conceive of the

vast bulk of the Empire functioning without them, we must guard ourselves against supposing that carriage and transportation had anything like the character they possess at the present day. We may say, in general, that transportation was not a special trade or profession. Owners of vessels were generally traders themselves, and took goods of others as supercargo. We have no evidence that trips were regularly made, except in so far that nearly all sailing was confined to the summer season, roughly between May and October. Since the carrier was also owner of some of the goods, the situation in respect to the contract was obviously different from that of modern carriers, and the rules which governed them were developed against a strikingly different background.

The fact already mentioned may explain why carriage was regularly conducted by individuals, and not by groups. We can scarcely think of a carrier at the present time, except as a corporation. The Romans used certain forms of partnership, practically corporations, for a number of purposes, notably the exploitation of mines and the collection of revenues, and they further used quasi public corporations in a variety of ways that are somewhat connected with transportation, but we almost never find contractors of transport, except as individual persons.

We may say, in general, that the carrier was held to a very high degree of diligence. As an illustration, we find a case cited in which one carrier in an emergency transferred the goods to another ship. When the second ship was lost, he had to establish his complete freedom from negligence and the exercise of competent judgment in the time and place and manner of the transshipment. A shipowner, who himself managed his ship without the aid of a trained pilot, was liable if the ship foundered in a storm, without reference to any negligence on his part.<sup>28</sup>

<sup>28</sup> D. 19, 2, 13, 1.

## SAME—THE RHODIAN LAW

93. Maritime contracts of carriage were governed by the law of the island of Rhodes, received into the Roman law as a part of it.

The frame of these contracts was still the *locatio conductio*.

The rules of jettison and general average, still in force in civil and common law countries, come from the Rhodian law.

Carriage of slaves had some special rules of its own.

The contract of carriage by sea was governed by a law of its own, which had a known origin. It was the law of Rhodes, a Greek island off the Asiatic coast, famous throughout ancient and modern history for its commerce and maritime skill. The Rhodian maritime law had been declared by Augustus to have a general binding effect on Romans, except where it was directly abrogated, and this rule was confirmed by Antoninus Pius (138–161 A. D.).<sup>29</sup> One of its most famous provisions, still in force, both in the civil and common law, is the rule of jettison and general average. If part of the cargo is cast overboard to lighten the load, the loss is not borne solely by the owner of the cargo sacrificed, and is divided among all the owners of the cargo and the master of the ship, in due proportion.<sup>30</sup> That is equally true, if the ship mast or other part of its tackle is cut away to save the ship. The usual procedure was for the owners of the jettisoned goods to sue the master *ex locato*, who would then, or at the same time, sue the owners of the goods saved *ex conducto*.<sup>31</sup> However, the master's liability was not increased, if some of the cargo owners were insolvent. He could be held only for his proportionate share

<sup>29</sup> W. Ashburner, *The Rhodian Sea Law* (1909); D. 14, 2, 9.

<sup>30</sup> D. 14, 2, 2, pr.

<sup>31</sup> D. 14, 2, 2, pr.



of the loss, based upon his ship and such part of the cargo as he owned.<sup>32</sup>

The property jettisoned remained that of its former owners, since it could not be treated as abandoned. If it was recovered, the loss was reduced by that amount, and those who had paid more than their share could sue the master, who must then attempt to recover the amount from the owners of the salvaged goods.<sup>33</sup>

These were only a few of the situations which the law of jettison dealt with. However, the Rhodian law was not exclusively confined to situations like these. It regulated, also, interruptions of the voyage through public authority and through capture by pirates. Further, the many instances in which adjustment of freight charges between carrier and cargo owner was necessary came within its provisions.

Nothing is said in our sources of carriage of passengers. These would undoubtedly come under the ordinary class of *locatio conductio operarum*. But carriage of slaves was obviously transportation of merchandise. However, there were some special rules. Slaves that died on the voyage, or leaped overboard, did not come within the provisions of general average. Secondly, even if a flat contract had been made for the transportation of the slave, the owner was not liable if the slave died on the voyage, except to the extent of food actually furnished him. Again, the master could not hold the owner liable if a slave woman had a child during the voyage, since this in no appreciable degree increased the expense of the carrier.

<sup>32</sup> D. 14, 2, 2, 5.

<sup>33</sup> D. 14, 2, 2, 7; 14, 2, 4, 1.

## SPECIAL LIABILITY OF CARRIERS, INNKEEPERS, AND STABLE KEEPERS

94. Three classes of *conductores* were held to a special liability for all the goods committed to their care. They were responsible for all loss, except that caused by unavoidable accident.

The liability could be varied by contract, and the bailee was not given a statutory lien.

At the common law there was a special liability on carriers and innkeepers, which made them in effect insurers of the goods intrusted to them against all loss, except that which was caused by unavoidable accident. This liability, indeed, is generally called the "common-law" liability; but the older writers on the law of bailments were well aware that it was taken over almost bodily from the Roman law.<sup>34</sup>

The liability of innkeepers, carriers, and stable keepers, at Roman law, was provided for in the prætor's edict. They were under an obligation to restore all goods which the guests or passengers had with them, or left in their charge, and they could not defend themselves by showing the utmost degree of diligence. Unavoidable accident, which no human prudence would avert or provide against, *damnum fatale*, or overwhelming force, *vis maior*, were, however, an adequate defense. A shipwreck might be included in either category.<sup>35</sup>

It was particularly noted that theft by a third person would not be permitted as a defense and the reason assigned was the fact that travelers have scarcely any chance to protect themselves against collusion between the innkeeper and the thief. This was precisely the reason advanced in the older English cases for the severity of this rule, and indicates that the conditions of traveling or transportation in medieval society were in this respect similar to those of ancient times.<sup>36</sup>

<sup>34</sup> Cf. Jones on Bailments, p. 125 et seq.

<sup>35</sup> D. 4, 9.

<sup>36</sup> D. 4, 9, 1, 1.

But, while ordinary theft—and doubtless robbery as well—was not a defense to the innkeeper, an attack by pirates was such a defense to a carrier.<sup>37</sup>

The liability was the same, whether an actual contract of *locatio conductio* had been entered into or not; that is to say, a guest received *gratis*, or a passenger carried as a favor, might hold the carrier or innkeeper to this same high degree of responsibility.

The obligation continued as long as the goods were actually in charge of the carrier—whom we may take as the representative of this class—even though they had not been loaded on the ship, or were already unloaded. So goods on the shore, or the dock, were to be guarded by him with precisely the same degree of care as those already on the vessel.<sup>38</sup>

Under modern statutes, innkeepers can generally avoid the common-law liability by a special contract, made by posting a notice and providing a means of securely keeping goods. Carriers, however, are generally forbidden to vary the terms of their special obligation.

At Roman law, such an agreement, if made before the voyage, or before the entrance of the guest into the inn, was valid; and the carrier was not liable, except as bailee, to the ordinary extent. Doubtless some effort was made to prevent abuse of this power on the part of the carrier and the rest, and it may be that the broad interpretation of which *dolus* or *metus* was capable was ample to protect the ordinary traveler.<sup>39</sup>

At common law, the innkeeper was held to be exercising a public calling and under a duty to receive all guests against whom no reasonable objection could be made. That was not the case at Roman law. Innkeepers could freely select their guests as carriers could select the persons they wished to contract with.<sup>40</sup> Indeed, this choice is given as the reason for imposing a specially grave burden upon them.

<sup>37</sup> D. 4, 9, 3, 1.

<sup>38</sup> D. 4, 9, 3, pr.

<sup>39</sup> D. 4, 9, 7, pr.

<sup>40</sup> D. 4, 9, 1, 1.

At the common law, this class of bailees has by way of compensation a special lien on the property intrusted to them. Such a lien might easily be established by agreement at Roman law, but apparently a general implied lien of this sort did not exist.

The Roman class of special custodians included stable keepers. These do not seem to have been included at the common law, where they were liable only for ordinary negligence.

The action against the carrier, innkeeper, or stable keeper in no way excluded any action in tort against the persons who had injured or stolen the property. These persons might still be prosecuted, in *furtum* or under the *lex Aquilia*, for the penalties obtainable in these actions. However, it is unlikely that, if full damage had actually been recovered under the *lex Aquilia* against the tort-feasor, an additional action *ex locato*, or otherwise, would lie against the carrier, although the case may have been different for *furtum*.

The action to recover the property bailed was wholly different from the quasi delictual action against the innkeeper, and the others of his class, for injuries done by their servants or employees (*supra*, § 53).

## CHAPTER 12

## PARTNERSHIP, CORPORATION, AND TRUST

## Section

- 95. Partnership—Character and Kinds.
- 96. The Action *Pro Socio*.
- 97. Dissolution.
- 98. Liabilities of Partners to Third Persons.
- 99. Corporations.
- 99a. A Theory of Development of Corporations.
- 100. The Revenue—Farming Associations.
- 101. Trusts and Foundations.

## PARTNERSHIP—CHARACTER AND KINDS

95. Joint ownership was not identical with partnership, but might become partnership by simple agreement.

*Societas unius rei* was the contract to administer one single thing jointly.

*Societas omnium bonorum* was the contract to administer all property jointly and be jointly liable for all debts.

*Societas negotiationis alicuius* was the “joint venture” of the common law, the contract to conduct a single transaction jointly.

*Societas bonorum quæ ex quæstu veniunt* (*s. quæstus, lucri*) was the ordinary business partnership. It required a contribution to be made by both partners.

Every consensual contract creates a joint interest of several persons. If there is a *res* involved, it is in some cases justified to speak of the contracting parties as having a joint interest in the *res*. The Roman vendor had the title, the purchaser the risk, of the goods sold. The owner of property had the vari-



ous rights that made up his ownership, and the *emphyteuta*, the *superficiarius*, and, as we shall see later, the usufructuary (cf. *infra*, § 141), had a limited group of rights in connection with the same thing. If, in some way, the interest of the two persons was of the same kind, we have joint ownership proper, and out of joint ownership the Roman contract of *societas*, partnership in its broadest aspects, seems to have arisen.

A joint ownership could arise in many ways without anything that can be called a contract being involved. Two men, otherwise unconnected, might find themselves joint heirs of the same testator, joint donees of the same grantor. And this situation might continue an appreciable time by sheer acquiescence, without any wish to engage in mutual responsibilities toward each other. But at some time the two owners must determine upon a *modus vivendi*, if they had not done so at the beginning; and, when they do so, the relation between them would be called a partnership, *societas*, at Roman law, although it would obviously not be more than joint ownership at common law.<sup>1</sup>

This partnership, called technically *societas unius rei*, "partnership in respect to a single thing," seems to have been the original form of the relation, and to have grown out of the *consortium*, the association of members of the same family in the administration of the family estate.<sup>2</sup>

But the primitive *consortium* was more closely maintained in a type of partnership which the modern common law does not know at all, the *societas omnium bonorum*, the "partnership in respect to all property." *Societas unius rei* was one extreme, and *societas omnium bonorum* the other. In such a partnership, all the property of all the partners, *socii*, was merged into a common fund, which included the property either had separately had, before the institution of the relation, as well as that acquired by joint or separate effort thereafter. Equally all obligations were now joint obligations. This type

<sup>1</sup> I. 3, 25; D. 17, 2; C. 4, 37.

<sup>2</sup> D. 17, 2, 5, pr.; 17, 2, 65, 10.

of partnership, interesting as it was historically, obviously had only a limited practical importance, although it is likely that a great many rules of partnership liability are best understood if we remember that they were originally applied to an association of this type.<sup>3</sup>

A high commercial importance, however, must be assigned to the associations formed for joint profit. These ranged from one limited to a particular transaction (*societas negotiationis alicuius*)—the “joint venture” of the common law, which is really no partnership at all—to a complete association for a considerable period in all matters of business gain, the *societas bonorum quæ ex quæstu veniunt*.<sup>4</sup> Generally each partner made a contribution, and this contribution was not necessarily concrete property, but might be skill and experience, or services.<sup>5</sup> Further, there must be a division of profits, if there were any. If A. made a contribution, but had no interest in the profits, that was a gift, but not a contract of partnership.<sup>6</sup> If A. made no contribution of any kind, but did have a share of the profit, that was either an out and out gift to him, or it was a “leonine partnership,” and wholly void.<sup>7</sup>

There must have been many situations here—just as in the partnership in respect of property, *societas rei*—in which an express indication of determination to be partners was necessary in order to classify the contract properly. We may have situations like the following: A. gave B. a pearl to sell, with the agreement that, if it sold for 10 aurei, B. was to remit the entire sum, but that he might keep all the excess over 10, if it sold for more. If there was anything in this to show an intention to be partners—express words, let us say—it was a *societas negotiationis alicuius*. Otherwise it was an innominate

<sup>3</sup> D. 17, 2, 1, 1; 17, 2, 74.

<sup>4</sup> D. 17, 2, 7; 17, 2, 8; 17, 2, 9; C. 4, 37, 1.

<sup>5</sup> D. 17, 2, 29, pr.

<sup>6</sup> I. 3, 25, 2; D. 17, 2, 30.

<sup>7</sup> D. 17, 2, 29, 2.

contract, and could be sued on only in the action *præscriptis verbis*.<sup>8</sup>

### SAME—THE ACTION *PRO SOCIO*

96. Either partner could bring the action *pro socio* for breach of the express agreements made, or for violation of the obligation to act in the highest good faith. However, the diligence required was only the *diligentia quanta*, the care each party was ordinarily capable of.

Partners were bound by a bond of brotherhood, *ius fraternitatis*. Condemnation in the action *pro socio* involved infamy. None the less, the amount of property necessary to support the delinquent partner was exempt from execution (*beneficium competentiæ*).

The contract was consensual, and the action by which it was enforced on either side, the action *pro socio*, was one of good faith. The partners could agree among themselves to share the profits in any way they wished, with the saving proviso that their agreement would be subjected to an equitable scrutiny.<sup>9</sup> The common-law requirement of the highest good faith was paralleled by the Roman *ius fraternitatis*, the "bond of brotherhood," which forbade any act that was oppressive or unfair.<sup>10</sup> As between the partners, this brotherly relation involved a certain indulgence. Partners owed each other only a reasonable care in the conduct of their affairs—not the abstract standard of a thoroughly competent business man. People engaged themselves to each other as they were, with their imperfections on their heads.<sup>11</sup>

<sup>8</sup> D. 17, 2, 44.

<sup>9</sup> D. 17, 2, 29, pr.; I. 3, 25, 9.

<sup>10</sup> D. 17, 2, 63, pr.

<sup>11</sup> I. 3, 25, 9.

But the care he must use, while measured by a less severe standard, could not be disregarded. If loss had been sustained by the culpable negligence of a partner, he must make it good, and he could not counterclaim any profit that exceptional industry and zeal had added to the partnership.<sup>12</sup>

The loss that must be shared was estimated on the broadest principles. A. and B. are *sagarii*; that is, dealers in cloaks. A. goes abroad to make purchases, and on the way is attacked, his slaves carried off, and his own money, as well as the partnership funds, taken from him. B. owes a half share of all these losses, as well as half the expenses to which A. may be put for medical attendance.<sup>13</sup>

In the same way, property improperly acquired by one partner does not accrue to the partnership. But, if it is used for partnership purposes, the gains are the profits of the enterprise and divided as such.<sup>14</sup>

It was further assumed that partners would not lightly allow their difficulties to reach the stage of litigation. To be condemned in the action *pro socio* involved infamy (supra, § 47).<sup>15</sup> At the same time even a delinquent partner—who had been guilty of no fraud—was not stripped of his property to satisfy the claims of his associate. He was allowed “the privilege of competence,” *beneficium competentiae*, an exemption of enough for his own and his family’s maintenance. This very modern sounding institution of an exemption meets us for the first time in this contract, but it is found in many other cases (infra, § 115).<sup>16</sup>

<sup>12</sup> D. 17, 2, 72; I. 3, 25, 9.

<sup>13</sup> D. 17, 2, 51, 4.

<sup>14</sup> D. 17, 2, 53.

<sup>15</sup> D. 17, 2, 63, 2; D. 3, 2, 1; I. 4, 16, 2.

<sup>16</sup> I. 4, 6, 38; D. 17, 2, 63, 2; 42, 1, 16.

## SAME—DISSOLUTION

97. Partnership could be dissolved at will by either party, whether or not a definite time had been fixed. Renunciation, however, could in neither case be made unseasonably.

Partnership was ended by *capitis deminutio*, bankruptcy or death of a partner; by extinction of subject-matter and completion of business undertaken.

Besides the action *pro socio*, the *actio communi dividundo* lay for a partition of the partnership property.

This bond of brotherhood could obviously not be made to last beyond the wish of either party; and that was so, even if there had been a definite time fixed for the partnership. Either partner could none the less terminate the relation by communicating his wish to do so, *renuntiatio*.<sup>17</sup> That, it will be remembered, is also the case in the common-law partnership. But no such renunciation, whether the partnership was for a definite or an indefinite object, could be made, either with the purpose of selfishly profiting at the other partner's expense or at an inopportune time.<sup>18</sup>

So, let us suppose that A. and B. have formed a partnership to make a specific purchase for resale. Before the thing is

<sup>17</sup> D. 17, 2, 4, 1; 17, 2, 63, 10.

<sup>18</sup> D. 17, 2, 65, 3; 17, 2, 65, 5. Cf. *Crawshay v. Maule* (1818) 1 Swanst. 495, 36 Eng. Rep. 479, and the many cases following it. There are a few cases contra, notably *Howell v. Harvey* (1843) 5 Ark. 270, 39 Am. Dec. 376, which, however, quotes only civil-law authorities, Pothier, Domat, and, of common-law writers, Story on Partnership. Story, however (5th Ed., § 273 et seq.), says that the rule is one of the civil law and not of the common law. The common-law rule is codified in the English Partnership Act and in the American Uniform Partnership Act, § 31 (1) (a).

However, some cases, such as *Fletcher v. Reed* (1881) 131 Mass. 312, assert that renunciation must not be made in bad faith, a statement generally appearing as a dictum.



bought, A. changed his mind concerning the profitability of the transaction and renounces the partnership. B., in spite of that, makes the purchase and incurs loss thereby A. is not liable. But if A. found an opportunity to make the purchase individually and renounced the partnership in order to do so, B. could claim, if he wished, his share of any profit that might accrue.<sup>19</sup>

Or, again, A. and B. form a partnership to buy and sell slaves. No time is mentioned. A. renounces at a time when the market is very poor. A. cannot compel an accounting or division at such a time, and B. may disregard the renunciation altogether, proceed with the transaction as though it had not occurred, and hold A. for his share of losses, when the partnership is finally dissolved.<sup>20</sup>

It is obvious that the death of either partner terminates the relationship, although there is an action between the 'partners' heirs for any claims or property left in their hands. Again, the extinction of the subject-matter of the partnership, or the completion of the business which it was formed to do, will extinguish the partnership. Not only death, but the *capitis deminutio maxima* or *media* (supra, § 39), or the bankruptcy of either partner, will obviously end the relation.<sup>21</sup>

Besides the action of *pro socio*, in which one partner claimed from the other the redress to which he was entitled because of the other's failure to maintain all his legal and equitable engagements, there was a special action, whereby the partners sought to divide the property which they owned in common. This was the action *communi dividundo*, obviously, like our partition suits, and ending in an *adiudicatio*, rather than a *condemnatio* (supra, § 20).<sup>22</sup>

An agreement that the property should not be divided within a certain time might be made, and would be enforced, even if,

<sup>19</sup> D. 17, 2, 65, 4.

<sup>20</sup> I. 3, 25, 5; D. 17, 2, 65, 9; 17, 2, 65, 10.

<sup>21</sup> D. 17, 2, 65, 11; G. 3, 153.

<sup>22</sup> D. 17, 2, 43.

as might well happen, the partnership was dissolved before that.<sup>23</sup>

### SAME—LIABILITIES OF PARTNERS TO THIRD PERSONS

98. At Roman law these questions were less important than at common law. There was no unlimited liability or almost unlimited agency.

One partner was liable for those acts of the other which he had specifically authorized or acquiesced in. He was further liable to the extent that he had profited by them.

He could sue on claims made by his partner's acts only by an adapted action.

There was no partnership by estoppel, or ostensible partnership.

It will be seen that the legal questions involved concern only the relations of the partners to one another. Similar legal questions occur in our system, and they are important ones; but they are nothing like so important for ordinary commercial purposes as the relation of the partners to third persons.

At the common law that is governed by a principle of almost unlimited mutual agency of the partners, and a consequent almost unlimited liability. Nearly every contract within the scope of the partnership business made by any partner binds all the partners, whether they had authorized it or not, even if they had expressly forbidden it, and without regard to whether they had profited by it or acquiesced in it.

At Roman law there was no such agency, and in consequence no such liability. Any contract made by any partner *prima facie* bound only the partner who made it. The other partners were bound only if they had expressly or impliedly authorized it, if they had ratified it or had profited by it. In the last

<sup>23</sup> D. 10, 3, 14, 3.

event they were bound at least to the extent of their enrichment. This was a simple application of the Roman rules governing agency, mandate, a contract of much more limited scope than the modern contract of agency (*infra*, § 106).<sup>24</sup>

And just as they were bound only if they had authorized the contract made by a single partner, so they could claim the benefits of such contracts only in so far as the rules of mandate permitted it. This involves, as we shall see later, that the partner who made the contract alone could sue on it directly, while the other partners could at best bring an action on the case, *actio utilis*.<sup>25</sup>

An important consequence flowed from this vital difference between the Roman and the Anglo-American partnership. The many complications which our "partnership by estoppel" creates had no meaning at Roman law. If C. believed A. and B. to be partners, he could not therefore sue B. on a contract made by A., unless B. had in fact authorized it. It would therefore make little difference whether A. and B. actually were partners or not. There was no need in announcing the dissolution of the firm, and no point in continuing the use of a retiring partner's name after his retirement. The firm gained no credit from the use of the name of any person. Ostensible and dormant partners were, then, equally irrelevant as far as the persons were concerned who dealt with the partnership.

It follows that the tests so frequently applied at the common law to determine whether persons are partners or not, and codified in such legislation as Uniform Partnership Act, § 7, have almost no value at Roman law. They are really concerned with the claims of third persons against partners, who did not make or authorize the contracts on which those claims are based. That situation, as has been stated, was dealt with quite differently at Roman law.

<sup>24</sup> D. 17, 2, 82.

<sup>25</sup> D. 14, 3, 1, 2.

## CORPORATIONS

99. According to the accepted theory, corporations proper, constituting entities different from the persons that composed them, could be freely created at Roman Law until the time of Augustus. After that time, it was made to depend on state license. Such corporations were always quasi public.

That the Roman partnership, despite its varying forms, was far from being as fully developed functionally as that of England and America, must be apparent. An even more characteristic form of modern commercial associations is the corporation, and of the Roman corporation we may say that it contained almost all the elements to be met with in modern corporations, but that the Romans found little occasion to use them.

Whether a corporate personality is a fiction or a reality has been largely discussed in the nineteenth century.<sup>26</sup> Gierke's splendid *Genossenschaftsrecht* furnished the impetus to a renewed examination of the question.<sup>27</sup> But, fiction or not, and whatever it turns out to be, corporate personality in form and substance was a thoroughly Roman concept.

There is an orthodox theory on the history of Roman corporations, which was established by Mommsen, and which is likely to be perpetuated in treatises and manuals, on the cumulative authority of Mommsen himself and of the authors of the treatises. A concise form is to be found in Mitteis' *Römisches Privatrecht* (1909).<sup>28</sup> It may be formulated as follows:

The power of forming corporations freely—the *liberté d'associer*—existed in Rome from time immemorial. Once formed,

<sup>26</sup> Maitland's Sedgwick Lecture (1913) 3 Maitland, *Collected Papers*, p. 304.

<sup>27</sup> Otto Gierke, *Das deutsche Genossenschaftsrecht*, 4 vols. Berlin, 1868-1913.

<sup>28</sup> Mitteis, *Das röm. Privatrecht bis auf Diokletian*, p. 394 et seq. The entire fifth chapter of this book deserves careful study. For later references, cf. Wenger-Mitteis edition of Sohm's *Institutes* (1923) p. 201; Rabel, *Grundzüge des röm. Privatrechts*; Holtzendorff-Kohler, *Enzyklopädie*, i, pp. 428, 429.

these corporations were entities. The individual members had obligations toward them and claims upon them. The corporation acted through its duly elected officers, control of whom was vested in the corporators. The latter met at regular intervals and acted in a formally determined way. By a statute of Augustus, this right of corporate activity was made dependent upon a formal state license, in which both senate and *princeps* co-operated. From that time on, only such corporations as were duly licensed possessed the powers and privileges enumerated. All other persons who assumed to exercise corporate functions were guilty of an offense, and succeeded only in creating the joint obligations of partners, in the Roman sense of the word.<sup>29</sup>

But, within the strictly limited sphere of licensed corporations, the enlargement of corporate powers went on, chiefly in the capacity to receive bequests and in specific immunities from various types of taxes and other governmental exactions.<sup>30</sup> The final form of such corporations as the firemen and the scavengers of Rome,<sup>31</sup> the firemen of Bætica,<sup>32</sup> or the musicians of Puteoli,<sup>33</sup> was not notably different from that of the Pacific Gas & Electric Company or the Erie Railroad. To be sure, none of the thousand questions relating to stocks and to stockholder's responsibility, to ultra vires acts, to holding companies and reorganizations, arose. The corporations mentioned were not organized for business purposes, but were distinctly of a public character, in whole or in part, performing services which in most modern communities are the functions of the state. We may say, therefore, that the technical word for a Roman corporation, *collegium*, *corpus*, meant a public corporation. Membership in it was designated by a term similar to that referring to other political privileges, *collegium habere*, as compared with *tribum habere*, *ordinem habere*, etc.<sup>34</sup>

<sup>29</sup> See Appendix I.

<sup>30</sup> D. 40, 3, 1; 34, 5, 20, 50, 4, 5; 50, 5, 3; 50, 6, 6.

<sup>31</sup> C. I. L. VI, 1872; 29, 691.

<sup>32</sup> C. I. L. II, 1167.

<sup>33</sup> C. I. L. X, 1642, 1643, 1647.

<sup>34</sup> D. 50, 2, 2, 1; 3, 4, 1, pr.; Cicero, Phil. VI, 12; C. I. L. III, 2, 940, v. 20; XIV, 196, N. 2112, v. 11.



That which gave the impulse to the creation and rapid growth of the modern corporation was the possibility of combining relatively small sums in a joint venture of considerable magnitude and of limiting the risk to the amount so invested. That could not be done by way of partnership in Anglo-American law because of the partners' unlimited liability. Again, the proper execution of a joint venture involving the co-operation of many men was impossible, because of the practically unlimited powers of any partner to act for the group. But in Rome it will be seen both difficulties were nonexistent. There was no general liability or general agency of individual co-operators, and a company of merchant adventurers might have sailed forth to colonize Thule, without creating a new legal unit or demanding legal concepts elsewhere unknown.

### A THEORY OF DEVELOPMENT OF CORPORATIONS

99a. A different view of the development of corporations is possible.

Corporations as such never required a state license even after Augustus. Certain corporations were entrusted with public functions and therefore privileged.

The economic organization of the later Empire caused private corporations gradually to die out.

In a Columbia dissertation (1909) *The Legislation of the Greeks and Romans on Corporations*, pp. 91-97, I advanced arguments for the belief that Mommsen's construction was without real foundation, that there was no law of Augustus on corporations, that the passage in Suetonius on which he principally relies (Aug. § 32) refers to the *lex Iulia de vi*, and that the inscription (*Corpus Inscriptionum Latinarum* [C. I. L.] vi, 4416), which he combines with the Suetonius passage, refers to some other law—perhaps, as I am now inclined to believe, Cæsar's *Lex Iulia Municipalis* or an amendment of it.

On a re-examination of the question it seems to me that these criticisms of Mommsen's position are still valid. If they are, we must suppose a wholly different development. The following seems to me most in accordance with existing evidence:

One type of corporation had always existed, and had been treated as fully organized entities. These were the municipalities, most of which had once been states, and the villages, districts, and wards, which were obviously in the same category. There were further a great many private associations organized on the public model, *ad exemplar rei publicæ*, like the ancient craft guilds, newly formed religious bodies, actors' unions, athletic unions, burial societies, and the like. These had corporate personality to the same extent as public bodies; that is, they sued and were sued in the corporate name, and the property of the corporation was distinct from that of the members.

From time to time these private associations were given special quasi public functions, as when fire protection or the cleaning of sewers was particularly assigned to certain religious bodies. Burial associations were especially encouraged among the very poor, to take over what would otherwise have been a public duty of the highest importance. The assignment of such functions was made by a decree or senatorial ordinance designating the body as one *cui cogi convocari coire licet* (*conferendi causa unde defuncti sepeliantur*), (C. I. L. xiv, 2112)—to use the burial society as an example. This license to meet for a special purpose exempted the body from any interference by police or magistrates, or from any statute that in general terms forbade public assemblages at certain times and places. Further, when the public corporations received immunities from guardianships, and privileges of bequest and the like, similar immunities were often granted to these quasi public bodies.

But, besides these corporations devoted to some branch of the public service, other private corporations continued to be formed freely, and were on the same legal footing as the oth-

ers, except in relation to the special privileges and immunities just mentioned. It was customary to base this association on the periodic performance in common of some religious rite. The individual members might be guilty of infraction of some law, but there was nothing illegal in the mere formation of such corporations, unless the purpose was criminal and specifically declared to be such by public authority.

The term *collegium illicitum* meant merely that the particular collegium had never received the designation of a quasi public body, and therefore was deprived of the particular privileges which such bodies had. Certain particular *collegia illicita* were prohibited, because their purpose was held to be criminal, and it is obvious that the urban police would check any large gathering under the general laws preventing riot and conspiracy. Doubtless, in the later Empire, these laws were enforced with special severity.

It is, however, clear that corporations ceased to be frequently formed during the second century of the Empire. This may be due to the tendency to regulation of all social functions, which began very soon, and which was finally to culminate in the caste-like guilds of the fourth and fifth centuries, into which most of the citizens of the state were absorbed.

### THE REVENUE-FARMING ASSOCIATIONS

100. Something like our business corporations existed in certain classes of partnership, the *societas publicanorum* formed to collect the revenues, and the *societas metallorum* formed to exploit the mines.

These had alienable shares and management by directors elected by the members. Apparently, liability was limited to the associations' property.

Modern corporations in the civil-law countries derive their name and many of the rules governing them from this type of partnership.

The best indication of that fact is the striking instance of the *societas publicanorum*, the partnership for the purpose of farm-

ing out the taxes, or for operating mines and quarries.<sup>35</sup> In this case the amount of money which the purchaser of the revenue needed was as a rule beyond the available fluid capital of any one man. It was usual, consequently, for a number—perhaps a large number—of persons to combine for that purpose, although generally the contract was let out to one of them. But an equal control of all partners was obviously impossible. Management had to be intrusted to a selected manager. The shares were transmissible and inheritable, and those who dealt with the company thought of their claims as limited by the common treasury—the *arca*—of the *societas*.<sup>36</sup> Except for the limited duration of such organizations, there is little that would be needed to convert this into a recognizable American corporation, amenable to blue sky laws and subject to corporation and stock transfer taxes.

The modern civil law of the European continent derived its corporation practice from the model of these special types of partnerships. The very name of the continental institution most resembling our corporation—*société anonyme*, *sociedad anónima*, *società anonima*—indicates it, and *societas*, in the modern Codes, generally includes both our partnership and our corporation. But there is no doubt that the quasi public *collegia* and *corpora*, consciously imitating state and municipal organization, maintained an unbroken line of descendants in a variety of organizations, and when modern conditions gave a new impulse to mercantile associations, the partnership scheme of the Roman law was rapidly developed into a real corporation in civil-law countries, because of the familiarity and persistence of the corporate idea in its public form. The assimilation of the two types had the unfortunate effect of making both depend on governmental licenses, duly applied for and formally issued; but in the nineteenth century this was abrogated for mercantile associations and the Roman freedom of organization re-established.<sup>37</sup>

<sup>35</sup> D. 39, 4, 13, pr.; 3, 4, 1, pr.

<sup>36</sup> D. 3, 4, 1, pr.; 17, 2, 59, pr.; 17, 2, 63, 8, 46, 1, 22.

<sup>37</sup> Cf. the French law of July 1, 1901. In other countries this freedom had been established earlier.

## TRUSTS AND FOUNDATIONS

101. The establishing of funds for charitable purposes was an institution fully developed in the Eastern part of the empire. It was later called the *pia causa*.

The Anglo-American trust was unknown as such. Testamentary trusts (*fidei-commissa*) performed some of their functions. Otherwise, besides the *pia causa*, the quasi public corporation could be a sort of trustee.

Resulting and constructive trusts were dealt with either by delictual action or by the contract of mandate.

One function of modern corporations—the creation of endowments for beneficent ends—neither the Roman quasi public *collegium* nor the *societas*, even on the analogy of a *societas publicanorum*, could quite fulfill. It is with this type of entity that modern civilians have peculiar difficulty, and in connection with which they have largely discussed the theory of corporations. The English law created the trust, which fully covered such situations before corporations came into any real importance. The later Roman law developed a type of foundation, known as *pia causa*, in which certain funds are definitely and permanently designated to effect certain purposes.<sup>38</sup> This seems to have been a Hellenistic conception, and was capable of indefinite development.<sup>39</sup>

The Anglo-American trust has as its essence the splitting of

<sup>38</sup> C. i, 2, 19. The earlier emperors—especially of the Antonine and Severan dynasties—established foundations for the support of widows and orphans, the so-called *alimenta*. Actual documents relating to these *alimenta* have been preserved. C. I. L. XI, 1147, Bruns, Fontes (7th Ed.) p. 346.

<sup>39</sup> Funds in the possession of temple treasuries were frequently earmarked for a particular purpose, so that the temple was sometimes compelled to borrow small sums for ordinary expenses in spite of the presence of large amounts of money in the treasury. Cf. Tarn, A Social Question of the Third Century (Hellenistic Age, pp. 109–111).



ownership into two groups of rights and powers, one which is given to the trustee and the other to the beneficiary. Its historical origin and primary purpose were very similar to those of the *piæ causæ*, the "foundations" just mentioned, and it is still often used for such organizations.<sup>40</sup> But it is a highly flexible and useful institution, and its connection with the administration of large corporations is one of the striking economic facts of recent American history. Very recently it has created what is in effect a new type of business organization, the "Massachusetts" or "business" trust.

In form, it is unknown to the Roman law. The testamentary institution of *fidei-commissum* has a great many external resemblances to some types of trusts, but the trust idea in general has no real counterpart in the Roman law or in its descendants. Yet most of the functions fulfilled by the trust could be carried out in some form by the foundation or the corporation. This was especially the case when the purpose of the trust was to devote a certain amount of property and its income to the carrying out of some purpose—generally of a public or charitable character. In the Greek-speaking East such trusts were extremely common. There, too, there was an admitted freedom of association. Any group might therefore be formed, and the title to the property would be, not in them personally, but in the group. That is to say, it could be administered by chosen representatives of the group, its use would be under the control of all the members of the group, and could not, except in rare instances, be alienated. The continuity of the group was provided for by the election of new members to fill the place of the old, or by the succession of the heirs of deceased members.

Such a group, created either directly by the act which set the fund apart, or creating itself by association afterwards, would

A complete examination of Greek foundations was undertaken by E. Ziebarth, *Zeitschrift für vergleichende Rechtswissenschaft*, 16, 249, 19, 298.

<sup>40</sup> Maitland, *The Origin of Uses*, 2 *Collected Papers*, 415; *Trust and Corporation*, 3 *Collected Papers*, 320-404, especially p. 357 et seq.

serve the purposes of our charitable trust, which is governed by rules appreciably different from that of ordinary trusts. As far as these latter are concerned, they are in effect merely devices to escape the rigor which the unpopular corporation had to undergo at the hands of most American communities—a rigor that is directly derived from the time when corporations were odious monopolies and were the constant examples of favoritism and exclusive privilege. No such odium attached to the great *societates publicanorum*, or to similar organizations that leased the mines. There is no doubt that any other large enterprise that filled an important public need would have seen similar organizations created.

Trusts for the purpose of conveyance, or of the performance of any other limited task of the sort, would be a type of mandate and will be discussed there (*infra*, § 47). The same thing may be said of a “resulting” trust. If A. bought land from B. with his own money, and ordered a conveyance to C., that at both Roman law and common law might be a gift. If it was not to be a gift, C. at common law is held as a resulting trustee; at Roman law he would be a mandatary, subject to A.’s direction.

What we call a constructive trust is merely a means of securing to the victim of a wrong some effective means of reparation. Roman delictual remedies were severer than in our system, and with the *condictio furtiva* (*supra*, § 47) and the *restitutio in integrum* (*supra*, § 23) accomplished nearly all the purposes of the constructive trust.

The needs of modern commerce have brought into existence several other forms of business organization. In England and America there are the limited partnership and the joint-stock company. On the continent we find the *société en commandite* and the *société à responsabilité limitée*. The purpose is either to limit the risk to a definite mass of property, against which alone the creditors can have claims, or else to make the shares of the various partners transferable. The latter result was reached at Roman law in the revenue-farming partnership, while the different concept of partnership liability made the former purpose a matter of less moment.

## CHAPTER 13

## MANDATE

## Section

- 102. Nature of Mandate.
- 103. Mandate as Suretyship.
- 104. The Equities of Sureties.
- 105. Discharge of Surety.
- 106. Mandate as Agency.
- 107. Mandate as Assignment.

## NATURE OF MANDATE

102. Mandate was unilateral and gratuitous. It was created between mandator and mandatary, as soon as the latter agreed to do something at the former's request.

The mandator could revoke, and the mandatary renounce, the contract at will.

In any case, whether the contract was carried out, revoked, or renounced, either party owed the other compensation for the loss suffered through the contract; the mandator suing in the direct mandate action, the mandatary in the contrary mandate action.

The contract of mandate was in several ways strikingly different from the other consensual contracts. These others—sale, hire, partnership—involved mutual obligations and were intended for mutual advantage. Mandate was unilateral. A. instructed B. to do some act. If B. consented, there was an obligation of a sort upon him to do it; but there was no obligation on A. to do anything. Further, as in the “real” contracts (*supra*, chapters 8 and 9), A. was under no obligation to compensate him for his services. If he promised to compensate him, it

ceased to be a mandate, and became a *locatio conductio operarum* or an innominate contract.<sup>1</sup>

The contract was characterized by what seems a curious privilege. Either A. or B., if the mandate had not yet been carried out, could withdraw at will. A., the mandator, could renounce, and B., the mandatary, could repudiate, the contract.<sup>2</sup> An engagement like this, depending upon the arbitrary will of either party, does not seem very much like a contract, and we should be tempted, following excellent Roman authority, to deny it that name.<sup>3</sup>

If we note one important qualification, the difference between mandate and other contracts will not seem to be so great. Neither repudiation nor renunciation could be made unseasonably. If A., relying on B.'s expected services, can no longer get them done without additional expense, or if B. has involved himself in such preparation for these services that he cannot countermand them without loss, there was at least the obligation in good faith to make the loss good.<sup>4</sup> This still makes the obligation depend upon an actual external act. But there was one special situation in which it was necessary to go further. Suppose, at the moment of repudiation, B. had as yet taken no steps, but that his inaction had caused the loss to A. of an opportunity that does not again present itself. Here is a form of damage that good faith may well wish to compensate; but, if we seek a moment at which to attach the obligation, it can only be when the mandate was accepted, when the agreement was reached.

Our texts classify mandates into those made for the benefit of the mandator exclusively, of the mandatary exclusively, of a third person exclusively, and some combination of these benefits. This scheme is of no importance, and the classes are mere

<sup>1</sup> I. 3, 26; D. 17, 1; C. 4, 35.

<sup>2</sup> I. 3, 26, 9; 3, 26, 11; D. 17, 1, 22, 11; G. 3, 159.

<sup>3</sup> D. 50, 17, 66.

<sup>4</sup> D. 17, 1, 22, 11.

applications of the requirement of good faith.<sup>5</sup> If A. asks B. to do an act, which can have no other purpose than B.'s advantage, it does not seem just or sensible to let B. recover from A. the damages resulting from a piece of advice which he was at liberty to reject, if he chose. But in almost any other case, when B. did at A.'s urging what he might not have done without it, A. could scarcely refuse responsibility for untoward incidents. And it does not seem that he could do so even when, as was frequently the case, A. personally derived no profit from the transaction, and such profit accrued wholly to a third person, or to a third person jointly with B.

### MANDATE AS SURETYSHIP

103. When the mandator urged the mandatary to make a contract with a third person, his liability to the mandatary was in effect that of a surety for the third person.

Suretyship or guaranty was also made in the form of a stipulation, the *fideiussio*. Both methods were used side by side.

What practical importance could there be in a gratuitous contract, defeasible at the will of either party? It might have rarely entered litigation, but for the readiness with which it fitted into a commercial transaction of the highest importance, that of personal security, suretyship or guaranty.

In the Institutes, for purposes of teaching, suretyship is treated under the formal contract of stipulation.<sup>6</sup> But in the Digest most of the cases of suretyship are discussed under a title in which the formal suretyship or *fideiussio* and mandate are inextricably interwoven.<sup>7</sup> No doubt suretyship could be constituted in the form of stipulation, and from time immemorial had been

<sup>5</sup> I. 3, 26, pr.; D. 17, 1, 2, pr.

<sup>6</sup> I. 3, 20.

<sup>7</sup> D. 46, 1; C. 8, 40; D. 17, 1, 32.



so constituted. When A. asks B., "If X. does not pay me, will you?" and B. replies in the affirmative, B.'s obligation to pay is enforceable as soon as the condition happens.

But when B. urges A. to become the creditor of X., e. g., when he urges him to stipulate for X.'s promise, to lend X. money, to sell X. goods on credit, or if, after A. has done all these things of his own accord, B. urges him to abstain from immediate suit against X., or otherwise extend further credit to him, that can evidently be called a mandate which B. has given A. Then, if X. does not fulfill his obligation, the loss suffered is damage flowing directly from an act which constituted the mandate, and in good faith B. should repair the damage. Making the guaranty by way of mandate was an easy way to obviate the formality of the stipulation, and formality, however slight, was felt to be as burdensome here as in the more important transactions of sale and letting.<sup>8</sup>

Yet we may note that a guaranty in the form of mandate was eminently a real transaction. Unless and until the mandatary had entered into the obligatory transaction with the third party, the mandate was revocable. It is just conceivable that a revocation might be unseasonable, but that can have been the case very rarely indeed. In a stipulation, however, the surety might be bound irrevocably, before the obligation secured came into existence, and he would have no power to prevent its coming into existence. Prospective creditors must have found this fact of value, since the formal *fideiussio* was never completely superseded by mandate, but maintained itself side by side with the informal contract.<sup>9</sup>

<sup>8</sup> D. 4, 4, 13, pr. ; C. 8, 41, 28.

<sup>9</sup> D. 46, 3, 95, 11.

## THE EQUITIES OF SURETIES

104. Whether the contract was made by mandate or *fideiussio*, a surety or guarantor had the following equities (*beneficia*):

- (1) The *beneficium cedendarum actionum*, of having all rights of action of the creditor assigned to him, something like the equities of subrogation and reimbursement.
- (2) The *beneficium divisionis* (after Hadrian), of compelling the creditor to divide the sum claimed among all the solvent cosureties.
- (3) The *beneficium ordinis* (*excussionis, discussionis*, introduced by Justinian), of compelling the creditor to exhaust his remedy against the principal debtor before calling on the surety.

Suretyship at the common law is a contract which, as many English and American decisions are at some pains to tell us, was borrowed from the Roman law, and apparently it was borrowed with a certain group of incidents of great and increasing importance. These incidents are the equitable relations which are created by the performance of the guaranty—relations between the surety and the principal debtor, between the surety and the creditor, and between several sureties.

Such equities were termed in Roman law *beneficia*, an almost exact equivalent, since the term means a claim granted of grace by the court, just as we may recall that early bills in chancery were petitions addressed to the chancellor's mercy. The earliest and most important was the *beneficium cedendarum actionum*,<sup>10</sup> the claim to have all rights of action of the creditor, either against the principal debtor or the other sureties, as well as all securities of these rights of action, transferred to the surety. The same difficulty was encountered as that which the common-

<sup>10</sup> D. 46, 1, 13; 46, 1, 17; 46, 1, 59; C. 8, 41, 21.

law courts so often met, and generally so clumsily. By payment of the principal debt to the creditor it is discharged. What right of action can then be transferred to the creditor?<sup>11</sup> The Romans found themselves obliged to consider this cession, or transfer of action, as a purchase of the debt, with consequences that must be considered shortly.

It will be seen that the *beneficium* of having the rights of action ceded covers completely the equities both of subrogation and of reimbursement, as we apply them. But there are certain important differences. The Anglo-American system treats the equity as an incident of payment and an indemnity to the paying surety. The Roman system, dealing with it as a purchase, required a demand for such cession, made on the creditor by the surety before payment. Otherwise payment discharged the debt completely, and there was nothing for the creditor to cede. If the creditor refused cession, he could himself not enforce his claim against the surety, for he would be met by the *exceptio doli*.<sup>12</sup> Such a solution was more clear-cut and logical than the usual common-law fictions, but was full of pitfalls for an unwary and ignorant surety, who might have failed to make a formal demand.

In the time of Hadrian, another *beneficium* was introduced, which applied to all types. This was the *beneficium divisionis*.<sup>13</sup>

<sup>11</sup> Cf. Eldon's decision in *Copis v. Middleton* (1823) Turn. & R. 224, and Brougham's approval of the doctrine in *Hodgson v. Shaw* (1834) 3 Myl. & K. 183. The distinction there made is the following: The primary liability of the debtor to the creditor is extinguished by payment on the surety, and therefore leaves nothing for the creditor to assign to the surety. If there are collateral securities, these, of course, survive payment, and may be demanded by the surety in accordance with his right of subrogation. The Mercantile Law Amendment Statutes, 19 & 20 Vict. c. 97, § 5, cured the difficulty in England, and interpretation has done so in America in part. The matter is fully discussed in the excellent case of *Lumpkin v. Mills* (1848) 4 Ga. 343.

<sup>12</sup> D. 46, 1, 59.

<sup>13</sup> I. 3, 20, 4; D. 46, 1, 26.

One of several sureties, sued for the debt, might plead by way of exception that there were other solvent sureties besides himself. If he established his plea, he would be liable only for his pro rata share of the debt. But a failure to set up the exception was fatal, since the debt was gone and there was no obligatory relation of any kind between the cosureties. In our courts we reach a similar result by the equity of contribution, which is not dependent on a preceding demand, and is not lost by an error in pleading, but puts the burden of collecting the contribution upon the cosurety who has paid.

The difficulties created in every system by the attempt to keep alive a debt which logically must be thought of as extinguished was solved finally neither by fiction nor by dialectic ingenuity, but by legislation. Justinian decreed simply that payment by a surety did not bar actions against the other sureties, or against the principal. It is quite characteristic that agreements (*pacta*) providing for this very thing had become extremely common among merchants before the rescript was issued, so that all the law did at Rome, as was so frequently the case in England, was to give legal authority to a custom in itself almost as binding as the law.<sup>14</sup>

A final protection for the surety was not granted until some years after the *Corpus* proper was promulgated. A little while after the last edition of the Code, in the fourth Novel (535 A. D.), Justinian established the *beneficium* which has been variously called *ordinis*,<sup>15</sup> *excussionis*, and, principally in common-law sources, *discussionis*.<sup>16</sup> It is a form of the equity of exoneration, and permits the surety to plead that the principal debtor

<sup>14</sup> C. 8, 40, 28.

<sup>15</sup> Nov. 4, 1.

<sup>16</sup> Neither "excussion" nor "discussion" occurs in this sense in the Roman law sources. "Discussion" is particularly the term of the Scotch law and the law of Louisiana; Black's Law Dictionary, s. v. "Discussion;" Bell's Commentaries, i, 347; Lorimer, Handbook of the Law of Scotland, § 1717; Louisiana Civil Code, § 3045. For excussion, cf. Escriche, Diccionario, s. v. "Excusion."

is solvent and should therefore be proceeded against first. We may say that it turns every guaranty into one of payment. Exoneration of this type was not usual at the common law, particularly if the guaranty was not expressly declared to be one of collection; but the doctrine of *Pain v. Packard* seemed to have introduced it into many of the United States, and apparently into the states adopting the Field Code.<sup>17</sup>

### DISCHARGE OF SURETY

105. Any defense, except purely personal ones, which the principal debtor had, was available to the surety. Alterations made in the contract by creditor and debtor would probably discharge the surety, if they amounted to a novation; i. e., a new contract superseding the old one, although between the same parties.

The *sctum. Velleianum* made a woman's contract of suretyship invalid. Until the time of Justinian, however, she might waive the statute by a special agreement to that effect. Justinian forbade such a waiver on the part of a married woman who became surety for her husband.

The common-law doctrine that whatever discharged the principal debtor equally discharged the surety prevailed at the Roman law; and, as in our law, a defense purely personal to the principal could not avail the surety. Precisely as in our system, one could agree not to sue the principal without thereby losing the right of proceeding against the surety.<sup>18</sup> But

<sup>17</sup> (1816) 13 Johns. (N. Y.) 174, 7 Am. Dec. 369. The case was criticized, but finally accepted, in New York. The doctrine is examined and disapproved in *Harris v. Newell* (1877) 42 Wis. 687, which follows the great weight of American authority. The code commissioners of California in connection with California Civil Code, § 2845, cite *Pain v. Packard* as the source of the rule.

<sup>18</sup> D. 2, 14, 22; *Bateson v. Gosling*.



it is not likely that the Roman law had the astounding doctrine that fraud and duress practiced by a creditor on a debtor were defenses peculiar to the latter and could not be set up by the surety.<sup>19</sup> The Digest and the Code contain no case in point, but the terms *dolus* and *metus* were broader than fraud and duress, and must have covered such indirect fraudulent practices, as well as those aimed directly at the surety.

Similarly there is nothing specifically stated on some questions which play so large a part in our law of suretyship. What was the effect in the suretyship contract of varying the principal obligation? We know how strictly these have been construed until we reach the rule in the Calvert Case that an alteration even to the surety's advantage discharges him.<sup>20</sup> That rule has, with the change in attitude toward corporate sureties, suffered a number of modifications, so that the rule may soon be general that only prejudicial alterations discharge the surety, and only to the extent of the prejudice.<sup>21</sup> At Roman law the question would, it seems, have to be determined in accordance with the means used to effect the alterations. If these were arranged between the creditor and the debtor by a simple informal pact, they would bind the parties, since a suit on the unchanged obligation would be met by the exception *pacti conventi*. This exception, of course, could not be pleaded by a surety who had not made the pact. If, on the other hand, a new obligation had been entered into, it is hard to see how this would fail to operate as a novation, of which the effect must be to discharge the original contract, and by so doing discharge the surety.

<sup>19</sup> (1871) 7 L. R. Com. Pl. 9, 25 Law T. (N. S.) 570; Bacon's Abridgment, Duress, B; *Huscombe v. Standing*, Cro. Jac. 187; *Henry v. Daley*, 17 Hun (N. Y.) 210; *Hazard v. Irwin*, 18 Pick. (Mass.) 95; *Griffith v. Sitgreaves*, 90 Pa. 161; *Ettlinger v. National Surety Co.*, 221 N. Y. 467, 117 N. E. 945, 3 A. L. R. 865. The matter is not free from doubt in other jurisdictions. Cf. 18 Columbia Law Review, 158.

<sup>20</sup> *Calvert v. London Dock Co.* (1838) 2 Keen, 638, 48 Eng. Rep. 774.

<sup>21</sup> *Union Oil Co. v. Pacific Surety Co.* (1920) 182 Cal. 69, 187 P. 14; 8 California Law Review, 355.

A very special defence to a suit on a contract of suretyship, however made, was reserved for a special class of citizens, viz. women. Married women had since the time of Augustus been restricted in their right to act as sureties for their husbands. By the *senatusconsultum Velleianum* (about 50 A. D.), all women were disqualified for acting as sureties for any one. If they made such a contract and were sued on it, they could plead the statute as a defence (*exceptio scti. Velleiani*). But the value of the protection thus accorded—a protection based, we are informed, on feminine feebleness of character, *propter sexus imbecillitatem*<sup>22</sup>—was much diminished by the fact that a woman might by special agreement waive the privilege. And she might lose it, if she deliberately became a surety, knowing that she would not be bound.<sup>23</sup> The same rule applied to any one who knowingly entered into any transaction which he had a legal right to rescind. To do so was obviously *dolus*, and it is to be noticed that it is a form of fraudulent practice for which the common law allows no redress.<sup>24</sup>

The matter of women's surety contracts was finally regulated by Justinian in a Novel (*supra*, § 34). The waiver was abolished in the case of married women who became sureties for their husbands, and some minor requirements were established for sureties in special cases. These provisions, known from the opening words of a Latin paraphrase of the Novels as *Authentica, si qua mulier* (*supra*, § 34), were retained throughout medieval times in most European countries and survived in some form until well into modern times in France.<sup>25</sup>

I have treated this rather special transaction in detail, for the reason that it illustrates better than formal exposition could do the similarities and differences of the legal attitude developed in the Roman and common-law systems. The general ideas, and perhaps some of the details, were borrowed by the

<sup>22</sup> D. 16, 1, 22.

<sup>23</sup> Paul, Sentences, 2, 11.

<sup>24</sup> D. 12, 6, 50; 44, 4, 8, pr.

<sup>25</sup> N. 134, c. 8.

younger law from the older; but in every case, as must have been apparent, the institution has suffered characteristic modifications in the transference.

### MANDATE AS AGENCY

106. Representation of a *paterfamilias* by a slave or son had always been common. But a slave or son could not bind the *paterfamilias*.

An independent agent could not bind his principal by stipulation, because of the rules governing stipulation.

Agency grew out of *actio institoria*, allowed against a *paterfamilias* for contracts made by his son or slave, when the latter was apparently independent. The master had adapted (*utiles*) actions against third persons on these contracts.

When mandates were given to strangers to make contracts for the mandator, the latter became bound in the *actio quasi institoria*, and had adapted actions against third persons.

These actions were supplementary to any others available. Even with them, the Roman agency was strikingly different from the common-law agency, especially in the fact that the agent did not drop out of the transaction.

The flexibility of mandate was not exhausted in becoming a rival of the formal contract of suretyship or *fideiussio*. It is thought of most frequently as the Roman equivalent of agency.

Here, as in suretyship, common-law courts and text-writers frequently tell us that the institution was borrowed from the civil law. It is all the more curious that this should be the case, since the parent of the civil law, the Roman law, had very inadequately and imperfectly developed it. For ministerial purposes, indeed, economic and social conditions made a theory of agency unnecessary. For such purposes a slave or a *filius*-

*familias* may be said to be the natural instrument. A slave might even make contracts in his master's name without having any real freedom of action, since the master could reject a disadvantageous transaction and accept a profitable one.<sup>26</sup>

But for many purposes such instrumentalities, which were really only extensions of the master's physical person, were unsuited. Instructions issued by A. to B. to do a specific thing, or general group of things, is the essential mark of a mandate. There was no reason why the instructions should not comprise the entering into obligatory transactions with third persons. A failure to carry out such a mandate might subject B. to an action by A., and expenses incurred by B. or losses suffered by B. would similarly justify suit against A. The obligations of good faith, which are so much insisted on in common-law discussions of agency, were taken for granted in the mandate, a transaction of good faith in every respect.

But at the present our principal concern in agency is not with the relations between principal and agent, but with the relations between the third person and the principal. Once the act is done by an agent within the scope of his authority, the agent drops out completely at common law, and the binding obligations are those between the principal and the third person. This idea the Romans found insuperably difficult. The mandate issued by A. to B. required him to make contracts with X., but making contracts meant incurring obligations. B., the agent, cannot possibly extricate himself from the bond which his actual co-operation with X. has created. The only difficulty was to get A., the principal, bound by it as well.

By the ordinary bond-making mechanism, the stipulation, this could not be done. One could not stipulate solely for another. But the agent could be instructed to stipulate, "Will you pay me or my principal?" and a payment to either would be a discharge. But, while the agent could thus qualifiedly bind X. to his principal, he was quite incapable of binding his principal to X. by

<sup>26</sup> I. 3, 28; C. 6, 61, 8, 3.

stipulation. The most complete solution the Romans arrived at came from another source.

The prætor first put his imperious hand upon the relation between father and *filius-familias*, master and slave. Where the contract between the slave and the third person had been made by a specific order of the master, or in the exercise of a definite business by land or sea for which the master had furnished the equipment, the prætor cut off the master's election to repudiate the transaction.<sup>27</sup> But the claim of the third person could be satisfied only out of the slave's *peculium*, of which the master had the theoretical title, or out of whatever fruits of the slave's transaction the master actually appropriated. One of the type situations was the conducting of a shop by the slave as his master's representative. The slave was then an *institor*, and the action against the master was called the *actio institoria*.<sup>28</sup>

Very early the prætors passed from this common situation into the almost equally common one in which such a shop is managed by a free man under mandate from another. Between a trusted slave and a free mandatary, or a tenant, the difference in practice was slight, and the creation of an action on the model of the *actio institoria* was comparatively easy.

At first it was the mandator's claims which were considered. The mandatary made contracts with third persons—contracts of various kinds, each one of which gave a corresponding cause

<sup>27</sup> I. 4, 7, 1; D. 15, 4, 1, 6; 15, 4, 5, pr. The third person would bring the action *quod iussu*, and in some cases a *condictio*. Similarly, an action called *tributoria* would lie against the master, if the slave dealt with his *peculium* with the master's consent, and on marshaling of the *peculium* a creditor claims to have been prejudiced. I. 4, 7, 3; D. 14, 4, 1.

There was also another action in which the master might be held liable, even for unauthorized contracts made by the slave, at any rate to the extent that he has profited by the increase of the slave's *peculium*. This was the action *de peculio*, and *in rem verso*. I. 4, 5, § 10, 4, 7, 4; D. 2, 14, 30, 1; D. 15, 3; C. 4, 26.

<sup>28</sup> I. 4, 7, 2; D. 14, 3; C. 4, 25.



of action. In all these cases, the mandator had an adapted action (*actio utilis*). If, for example, the mandatary bought a *res*, the mandator could sue the vendor in an *utilis actio ex empto*. It was the same for stipulations, for real contracts and innominate contracts.<sup>29</sup>

Conversely, the third person was given a right of action against the mandator. The *actio institoria* was primarily against the master of a slave, but it was early transferred to the case when, instead of a slave, a free person had been hired to manage a shop. Again, a slave put in charge of a ship was an *exercitor*. The action against his owner was the *actio exercitoria*, and if, instead of a slave, a free person was engaged for this purpose, the same action could be maintained against the employer.<sup>30</sup>

And the special instances of managing a shop or a ship became generalized. Suppose A. instructed a friend to borrow money for him (A.); if these instructions are carried out, the lender, we are told, may sue A. on an action based on the *actio institoria* (*ad exemplum a. i.*). Or, if a free agent (*procurator*) warranted goods in a sale, the purchaser may sue the principal in the *utilis actio ad exemplum actionis institoriae*.<sup>31</sup>

The words "adapted action"—*actio quasi institoria*, *actio ad exemplum*, *utilis actio institoria*—were also used when the acts were those of a slave, but of a slave who was not exactly an *institor*. The case is cited of the slave of an undertaker, who stripped a body which he was embalming. The persons interested—doubtless the heirs of the deceased—had a quasi institory action, as well as the noxal actions for the slave's tort.<sup>32</sup> But the term *institor* was soon generally applied to either a slave or a free man, who had a relatively independent management of any group of transactions, whatever they might be.

There was no limitation of capacity, either to be principal

<sup>29</sup> D. 19, 1, 13, 25; 14, 3, 2.

<sup>30</sup> I. 4, 7, 2; D. 14, 1, 1, 15.

<sup>31</sup> D. 14, 3, 12; 14, 3, 13, 3; 14, 3, 16; 14, 3, 19, pr.

<sup>32</sup> D. 14, 3, 5, 8.

or agent. Young boys and girls were often put in charge of shops, Gaius states, and women or minors could appoint agents and be bound by their acts to the same extent—but, of course, to no greater extent—than they would be bound by their own contracts.

An agent with very general powers, the *procurator omnium bonorum, universorum bonorum, etc.*, would be somewhat equivalent to one acting under a power of attorney.<sup>33</sup> The term, indeed, ordinarily implied a very general agency, and was only later applied to a special or limited agency for a specified group of transactions. A further limitation was the application of the word to an attorney at law; i. e., the agent whose special function it is to act for his principal in conducting legal process of any sort, either as plaintiff or defendant. Such a procurator had ample powers, which his successor in modern systems has inherited.<sup>34</sup>

As far as the mandator was concerned, there was a qualification. He could not use the adapted action, unless there was no other way of protecting his interests. That must, of necessity, have been the case in most instances. But this fact, and the further fact that the mandatary never dropped out of the transaction, were the special characteristics of these claims on agency. They were supplementary, additional claims, existing over and above the claims which the transactions actually entered into necessarily created. In the later civilian terminology they were actions *adiecticiæ qualitatis*.<sup>35</sup>

The contrast between the modern agent whether at the civil or the common law may be shown in the following illustration:

A., in obedience to P.'s instructions, buys goods on P.'s behalf from X. In the modern law, P. owes X. the price, and X. owes P. the goods. But A. and X. need have no obligations toward each other at all. P. and A. are under obligations to

<sup>33</sup> D. 3, 3, 1; 3, 3, 33; 3, 3, 63; 46, 3, 12.

<sup>34</sup> G. 4, 82-86; D. 3, 3, 33, 1; 49, 1, 4, 5.

<sup>35</sup> Buckland, Text-Book, p. 686 et seq.; Sohm-Mitteis-Wenger, Institutionen des römischen Rechts (17th Ed.) § 77.

each other, only if there has been a contract between them, which must fulfill all the requirements of ordinary contracts, and, if there is such a contract, there are certain mutual obligations of good faith, reimbursement, etc., implied as well.

Again, at the common law, if A.'s action was unauthorized in whole or in part, he is liable to X. for the breach of his implied warranty of authority—a palpable fiction and one of recent growth.

At the Roman law, the situation is quite different. A. owes X. the price, and X. owes A. the goods. Besides these claims, P. may sue X. in an adapted action, and X. may sue P. in an action modeled on the institory action. Of course, in neither case, may there be double recovery.

Further, the mere instruction issued by P. to A., and assented to by A., creates a contract of mandate between the two, with mutual obligations, enforced by direct and contrary actions.

How incomplete this is, when compared with agency in the modern civil law or at the common law, need hardly be pointed out. Its only advantage lay in obviating the necessity of our confessedly anomalous undisclosed principal and our fiction of implied warranty of authority. The agent was always liable, authorized or unauthorized. And the principal was always liable, known or unknown, when he took into his possession the fruits of the agency.

### MANDATE AS ASSIGNMENT

107. A mandate to sue in the mandator's name made the mandatary a procurator.

If the procurator was permitted to keep the results of the litigation, *procurator in rem suam*, he became virtually an assignee.

No fiction was necessary, and if the debtor had notice he could not disregard the assignee without *dolus*.

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Mandate had a further function to perform, besides that of creating agency and simplifying suretyship. It made assignment possible. That came through a specialized form of mandate—the procedural type. If a mandatary may be an agent, there is no reason why the particular agency should not be that of an attorney in fact or at law. Indeed, this special form of agency was common enough to have the specific name of *cognitor* or *procurator*.<sup>36</sup> It was common, no doubt, to select a freedman for this purpose, between whom and his former master there existed a relation of trust and confidence, as well as a requirement of deference. But in any case the *procurator* needed to sue in his principal's name and yet be able to collect the judgment himself. The *formula* in the way just indicated furnished an easy means of trying the issue as one between the principal as obligee and his obligor, but condemning the defendant to pay to the attorney, the *procurator*. Since the latter was a mandatary, he owed the duty of accounting to his principal, but to no one else.

If we can contrive to eliminate the duty to account, we have, of course, most of the elements of an assignment. And that could be done by mere agreement between principal and agent. The *procurator* was allowed to recover and keep the proceeds, *procurator in rem suam*. The only additional thing that the assignee in many common-law jurisdictions has is the right to sue in his own name—a relatively unimportant privilege.

But the assignee, as an agent, would still be laboring under difficulties. The death of the principal ended the relation. Payment to the principal, the owner of the obligation, extinguished it. The first difficulty was cured by allowing the assignee to bring an adapted action, an action as if he had made the contract in the beginning. It was unnecessary for him to make a fictitious, but nontraversable, allegation. He told the truth, and the *iudex* was instructed on proof to condemn the obligor

<sup>36</sup> G. 4, 83-84; I. 4, 10, 1.

to the *procurator*.<sup>37</sup> The other difficulty was met by permitting the assignee to notify the original obligor of the assignment. Payment to the assignor would now be a fraud on the assignee. If the latter sued, and the defendant pleaded payment, the replication would be *dolus*.

<sup>37</sup> G. 4, 86; D. 49, 1, 20; 49, 1, 1, 12.



## CHAPTER 14

## THE CONDICTIONS AND QUASI CONTRACTS

## Section

- 108. Condictions.
- 109. Types of Condictions.
- 110. The Term *Causa*.
- 111. Unjust Enrichment.
- 112. *Negotiorum Gestio*.
- 112a. Pacts and Natural Obligations.

## CONDICTIONS

108. The condictio was a suit for a liquidated sum or a specific amount of fungible goods owed in contract or delict.

It would also lie to get back money paid which should not have been paid (*indebitum*). But it would not lie, if the money was paid as a moral obligation.

The term "condiction"—Latin *condictio*—is first met with in the *legis actio per conductionem*, of which we do not know very much (supra, § 11). The various meanings which it acquired in the centuries of its use are of no immediate concern. When we find it in our present sources, it almost always means a special thing, to wit, an action for a specific and liquidated sum, or for the value of a specific *res*.<sup>1</sup> In the case of a stipulation (supra, § 55), the *condictio certæ pecuniæ* was used when the promisor had promised a sum certain in money;<sup>2</sup> the *condictio triticaria* when he had promised a fixed amount of some other kind of fungible goods.<sup>3</sup> In the case of theft, if the stolen article was destroyed or lost, the own-

<sup>1</sup> I. 4, 5, 15; D. 44, 7, 25, pr.

<sup>2</sup> I. 3, 15, pr.; D. 12, 2, 28.

<sup>3</sup> D. 13, 3.

er could sue the thief or possessor in the *condictio furtiva* for its value.<sup>4</sup> This was quite apart from the vindication, in which the owner laid claim to an actual present and tangible *res*.<sup>5</sup>

The *condictio certæ pecuniæ* was based upon a formal contract. The *condictio furtiva* was based upon a wrongful taking. There were, however, cases in which there was no promise to give and no wrongful deprivation of property, but in which the situation plainly showed that B. had money or goods which should be A.'s. A. has paid money to B. on a contract, which was later lawfully rescinded. A. has paid money to B. under a mistake of some sort. In both cases A. ought to get his money back. Yet B. has never contracted to pay it, and in most cases B. did no wrong in accepting the money. Title certainly passed in all these cases, and therefore, whether it was money or goods that were involved, no vindication will lie.

Whatever wrong exists is in the detention of the property by B. after the facts just mentioned became apparent. A. will bring the action that is appropriate to recover a specific amount, the *condictio* (*condicere*), and the most general form of the *condictio* is the *condictio indebiti*, the suit to recover what was paid, although it was not owed.<sup>6</sup>

In this condition the obvious defense would be that the payment was owed. And this defense would be available, not only when a subsisting obligation was present in accordance with which the money had been paid, but if, in equity and good faith, it might properly have been paid.

There were two quite common cases in which such equities arose. One was the case in which the money had been agreed to be paid, without putting the agreement in the proper form. Such a formless agreement was called a pact, more fully *pactum conventum*, and the plea that the money which was

<sup>4</sup> I. 4, 1, 19.

<sup>5</sup> D. 44, 7, 25, pr.; G. 4, 5.

<sup>6</sup> D. 12, 6; C. 4, 5.

sued for in the *condictio indebiti* had been paid for in accordance with such an agreement, the *exceptio pacti conventi*, was a complete defense.<sup>7</sup>

The other case was that of a "natural" obligation. No enforceable contract could be made between father and *filius-familias*, between master and slave, and few between patron and the freedman. Yet such contracts were frequently made, and in most cases punctually performed. Payment under such an agreement or contract, if it could be called such, was strictly speaking an *indebitum*; but there was a moral obligation to fulfill one's engagements, even to one who could not compel fulfillment. The condictio would not lie here.<sup>8</sup>

As an example of the qualifications of the condictio, a typical case cited in the Institutes may serve: A. has paid 1,000 *aurei* to B., who is an infant below the age of puberty (*pupillus*). He paid it in the mistaken belief that he owed it, and neglected to have the payment made through the guardian of the infant (*tutor*). In any other case the *condictio* would lie. In this, the public policy in refusing validity to any transaction of a *pupillus* creates a defense to it (*supra*, § 41).<sup>9</sup>

### TYPES OF CONDICTIONS

109. The basis of the condictio might be that the plaintiff had paid money (1) by mistake; (2) without a good reason (*sine causa*); (3) for a reason disapproved at law (*ob turpem causam*); (4) without receiving a return which had been reasonably expected (*causa non secuta*).

To pay money that was not due is generally caused by a mistake of some kind. But the situation may be caused by subsequent events. The contract under which the payment was

<sup>7</sup> D. 2, 14; C. 2, 3.

<sup>8</sup> D. 12, 6, 19, pr.; 26, 8, 5, pr.; 44, 7, 14.

<sup>9</sup> I. 3, 14, 1.

made may be rescinded. It may have been void, because illegal or immoral; or there may have been a time for deliberation, and one of the parties may have chosen to withdraw at its expiration. Under any of these cases, a condiction would lie to recover the money paid.

To describe the situation which resulted in an *indebitum*, a sum not due being left in the hands of B., the term *causa* was frequently employed. This term means, in quite ordinary Latin usage, both "reason" and "situation." Some cases cited in the Digest will illustrate: A. has given clothes to a fuller to be washed. The clothes are lost by theft. A. sues the fuller and recovers the damages in an action *ex locato*. Later A. finds his clothes. Can he also keep the money he got from the fuller? Plainly not. We may say that there was a mutual mistake as to the basis of the payment, but after all the fuller paid because he had to. There was no mistake that judgment had gone against him. Ulpian finally suggests that the fuller has really paid *sine causa*, without any good reason, as it turned out, for the payment.<sup>10</sup>

Just as such payments are *sine causa*, there are others in which a good reason had been expected, but, as a matter of fact, did not arise—*causa non secuta est*.<sup>11</sup> It is expressly stated that the suit *causa non secuta* is put in the same category as though it were *sine causa*.<sup>12</sup>

One example is concerned with master and slave. A., a supposed slave, gives B., his master, money in order to be emancipated. It later becomes known that B., unknown to himself or to A., had been a free man at all times. He can, of course, get his money back.<sup>13</sup> But how shall the situation be classified? It is not really different from the illustration given before, and it may be described in either way, as a claim for money given *sine causa*, or *causa non secuta*.

<sup>10</sup> D. 12, 6, 66; 12, 7, 2.

<sup>11</sup> D. 12, 4; C. 4, 6.

<sup>12</sup> D. 12, 7, 1, 2; 12, 7, 4.

<sup>13</sup> D. 12, 4, 3, 5.

There were many similar situations. A. gives B. money not to commit a crime, or to induce B. to return an object lent for safe-keeping. There is nothing dishonorable in A.'s desiring the crime not to be committed, or in wishing the property returned. There is something dishonorable in B.'s requiring payment to do what he ought to do. Money under such circumstances can be recovered, because given *ob turpem causam*, "because of a dishonorable situation," since the word *causa* has its larger connotation in this phrase.<sup>14</sup> The same thing applies when money is paid under a stipulation extorted by fraud, or when a promisor has failed to do what he has promised unless he receives additional pay. It was morally disgraceful to take this money, and it could be got back.<sup>15</sup>

If we compare these cases with that of the fuller, we shall see that the only real difference is the character of the act at the moment of acceptance. In the fuller's case, the payment is not only proper at the time, but could have been legally compelled. In the others, payment was highly improper. But in all cases it might be said that there was no sufficient legal reason for the payment of the money, whether that fact was or was not known by the recipient.

### THE TERM CAUSA

110. The term *causa*, in these phrases, is the ordinary Latin word for "reason" or "situation." It describes the circumstances under which the condition will lie, and does not qualify the action.

The term, influenced by the late Latin use in which *causa* meant the same as *res*, has been treated by modern writers as though it were an essential element of a contract, like the English consideration. It is a wholly different concept.

<sup>14</sup> D. 12, 4.

<sup>15</sup> D. 12, 5, 8; 12, 5, 9, 1.



The terms *sine causa*, *ob iniustam causam*, *ob turpem causam*, *causa non secuta*, are merely phrases of description. They do not qualify the suit at law, but the situation which gives a basis for the suit. The suit itself is in every case a general action, the *condictio*, which lies whenever money or property is in the hands of a man who *ex æquo et bono* ought not to have it as against another. The varieties of such situations are as numerous as the dolose devices of men can suggest. When they were collected for examination into the various titles to Code and Digest, they formed an incongruous and miscellaneous assemblage.

As has been seen, some of the cases will fit into one title as well as another. The headings of each title, the "rubrics," were, of course, nothing more than memoranda of what the title contained.

In one case a phrase occurs in the title only, and not in the text at all. That is *causa data*, *causa non secuta*. If we look at the text itself, *causa secuta* occurs occasionally, but *causa data* never. Instead of it we find the expression *re data*.<sup>16</sup> The condictio is therefore the action that is brought when property is parted with in the expectation of a return and no return is forthcoming, and *causa* is the equivalent of *res*. That had become almost completely the case in Latin by the time of the compilation of the *Corpus*. In the modern Romance languages, words derived from *causa*, French *chose*, Italian and Spanish *cosa*, are the ordinary words for "thing." It had already begun to be the case in the second and third centuries A. D., when most of the passages excerpted in the Digest were written.<sup>17</sup>

With this meaning of *causa* as the equivalent of *res* in mind, and with the titles of the Digest before them, the civilian com-

<sup>16</sup> D. 12, 4, 2; 12, 4, 14; C. 4, 6, 5.

<sup>17</sup> Thesaurus Linguae Latinae, s. v. *causa*, p. 700. The word occurs in something like this sense as early as Cicero, *de lege agraria*, § 11, and, with quite this meaning, in the fourth and fifth century writers, Lampridius, Arnobius.

mentators of the twelfth and later centuries treated the phrases as technical names of the actions they described, and took the word *causa*, used in at least three different senses in these titles, as an entity by itself, an abstract entity of great legal importance. This process, called "hypostatizing" in philosophy, has caused serious harm to an understanding of the Roman contract, and especial harm to those who approach it from the point of view of the common law, because of the constant tendency to equate "*causa*" and "consideration" in some fashion.<sup>18</sup>

Just what consideration is has been found extremely difficult to define with precision, although in a great many concrete instances it is easy enough to say that the contract is invalid, because without consideration. It may be doubted whether the concept will prove of much value or vitality in the future development of Anglo-American law. But it is undoubtedly an element of the law as it is now; that is, there are agreements which, though the terms are mutually satisfactory to the parties concerned, are not enforceable in a court, because of the absence of consideration.<sup>19</sup>

Nearly all the modern systems of law, derived from the Roman, adopted *causa* in some form as an element of a contract. In most of the Codes based upon the French Code, the general statement is made that an obligation without a *causa*, or for an immoral or illegal *causa*, is without effect. The term was subjected to a severe and destructive criticism by M. Planiol, author of one of the most widely-used manuals of French law, and this criticism has not been successfully met.<sup>20</sup> The recent codifications of the civil-law system, the German, Swiss, and Brazilian Codes, omit all mention of it. But it still

<sup>18</sup> E. G. Lorenzen, *Causa and Consideration in Law of Contracts*, 28 Yale Law Journal, 621. Cf. 35 South African Law Journal, 409.

<sup>19</sup> The most recent and complete discussion of consideration at the common law is to be found in Williston, *Contracts*, i, c. vi, §§ 99-204.

<sup>20</sup> Marcel Planiol, *Traité Élémentaire de Droit Civil*, II, §§ 1026-1039. However, compare the admirable book of Professor Henri Capitant, "*De la Cause des Obligations*," 3rd Ed. Paris, 1927.

finds a place in most manuals of French, Italian, and Spanish law, and in the great repertoria in which the judicial decisions of those countries are collected.

### UNJUST ENRICHMENT

111. One basis for the condictio was the suit to get back as *indebitum* what in equity, as between plaintiff and defendant, ought to be plaintiff's; i. e., to prevent "unjust enrichment."

This is the basis of modern quasi contract.

In the title on the *Condictio Indebiti* (D. 12, 6) occurs the sentence (Pomponius, D. 12, 6, 14) *æquum est neminem cum alterius detrimento fieri locupletiozem*. "It is in accordance with natural equity that no one become richer by reason of some one else's loss." This sentence, which was quoted in Mansfield's decision of *Moses v. Macfarlan*,<sup>21</sup> has been made the foundation of claims based on unjust enrichment. Unjust enrichment, again, is the principal basis of quasi contract in Anglo-American law, and perhaps the most characteristic form of it.

Literally construed, the sentence from Pomponius is, of course, nothing better than a moral ideal; but it must be taken with the qualifications derived from its application. Its essence lay in the requirement that, if B. has obtained A.'s property in such a way that well-defined moral sanctions would require him to return it, he can be made legally to do so. If no such sanction exists, the mere fact that B. could not have sued A. for the property is not a basis for the *condictio*. So, if B. owes A. money to be paid December 1, and in ignorance of that fact pays it on November 1, he cannot recover it.<sup>22</sup> Again, if A. sues B. and loses, although his claim is well founded, B. may be convinced of that fact, and pay in spite of his

<sup>21</sup> (1760) 2 Burr. 1005.

<sup>22</sup> D. 12, 5, 10; 12, 6, 16.

success in the courts. B. will then not be able to recover. Or if B., having a good defense, prefers to pay rather than run the risks of litigation, he cannot recover.<sup>23</sup>

The moral sanctions mentioned must be those which the institutions of the community support.<sup>24</sup> Suppose a minor—less than fourteen years of age—makes a stipulation for a perfectly valid and fair return, and pays under it, the minor can none the less recover his money.<sup>25</sup> And money paid by mistake to him cannot be recovered. These violations of what seems *æquum et bonum* are due to the fact that the public policy which governed such transactions was felt to be superior to the prejudice sustained by any particular person.

### NEGOTIORUM GESTIO

112. *Negotiorum gestio* was the unauthorized management of the affairs of an absent or incompetent principal. If done in good faith, it created an obligation for necessary expenses against the principal, enforced by the *actio negotiorum gestorum contraria*.

If the agent failed to use *exacta diligentia*, the principal could sue him in the direct action.

In all cases, the special circumstances were controlling as to whether either action would lie.

There are few persons for whom the common law has so little kindness as for the voluntary intermeddler in other persons' affairs. Not even equity will aid a volunteer, we are told. A person by unsolicited interference may incur liabilities, but scarcely obtain rights, as when an intermeddler with the property of an estate becomes executor *de son tort*.<sup>26</sup>

<sup>23</sup> D. 12, 6, 65, 1; I. 3, 27, 7; C. 4, 5, 4; D. 12, 6, 24.

<sup>24</sup> D. 12, 6, 66.

<sup>25</sup> D. 12, 6, 41.

<sup>26</sup> The extent to which the common law permitted dutiful interven-

In the Roman law it was quite otherwise. A volunteer, who believed in good faith that the interests of an absent friend were in danger of suffering by neglect, might act for him. The purpose, as declared by the Institutes, was to prevent prejudice to persons who were compelled to undertake voyages hastily without having properly appointed agents behind them.<sup>27</sup> Any person might act as such agent, and was accountable to the absent principal for the utmost diligence in his conduct, *exacta diligentia*. This liability was enforced by the direct action, *actio negotiorum gestorum directa*. Similarly, he could demand reimbursement and indemnity against the principal by the contrary action, *actio n. g. contraria*, but obviously he was entitled to no compensation for his services.

The action was derived from the prætor's edict, as one might suppose.<sup>28</sup> The commonest occasion for a *negotiorum gestio* arose when property belonging to an absent person was being seized by another claimant, or a mortgage foreclosed against him. It was available, if the principal had suddenly become incompetent, and even if the *gestor* erroneously believed himself to be a mandatary.<sup>29</sup>

But, if the *gestor* had his own profit solely in mind in the transaction, the decision was somewhat different. He was liable to the principal in the direct action, but he could not bring the contrary action for reimbursement of expense, except to the extent that his expenditure had actually enriched the principal.<sup>30</sup>

It was quite possible that the principal might have preferred the act not to be done. In that case the test was whether the act had really been to the principal's advantage, or would have been so, if it had been successful. Failure to accomplish

tion in another's affairs is discussed in Woodward, Law of Quasi Contracts, §§ 191-210. Cf. *Irvine v. Angus*, 93 F. 629, 35 C. C. A. 501.

<sup>27</sup> I. 3, 27, 1; D. 3, 5; C. 2, 19.

<sup>28</sup> D. 3, 5, 3.

<sup>29</sup> D. 3, 5, 5, pr.

<sup>30</sup> D. 3, 5, 5, 5.



the result intended did not bar the action, if the volunteer had used the proper diligence. But the principal was not bound for useless or unnecessary acts, with whatever good purpose they had been done. And the expenses which the *gestor* might collect could never exceed the amount a reasonable person would have spent.<sup>31</sup>

But in a number of situations, in which one person acted voluntarily on another's behalf, no action of *negotiorum gestio* would lie. Those were situations in which it could not be assumed that the *gestor* expected payment. Most of them were concerned with domestic relations. A mother who supplied her son with food—even if he was adult—would be assumed to have done so out of maternal affection. Similarly a husband, who paid for medical attention given to his wife, could not recover the amount from his father-in-law, though the latter's *potestas* over his married daughter still subsisted. But it was different with funeral expenses incurred by a husband for his wife. Whether his father-in-law was liable depended upon whether there was any indication that the husband had meant to defray the expenses himself or not. A similar rule prevailed if, instead of food, it was some other type of expenditure which a mother had incurred for her son.<sup>32</sup>

A special case existed when a son, whether emancipated or not, paid a debt for his father. In the absence of contrary evidence, it would be assumed to be a gift.<sup>33</sup>

By the weight of ancient authority, the contrary action of *negotiorum gestio* never lay, if the principal did not wish the act to be done, or expressly forbade it, or if he objected to the volunteer for personal reasons. Justinian finally determined that, to free himself from liability, notice of the principal's refusal must actually reach the agent, and that for services rendered before such notice the principal was liable.<sup>34</sup>

<sup>31</sup> D. 3, 5, 7, 3.

<sup>32</sup> D. 3, 4, 33; C. 2, 18, 11; 2, 18, 13; 2, 18, 15; D. 3, 5, 24.

<sup>33</sup> C. 2, 18, 12.

<sup>34</sup> C. 2, 18, 24.

## PACTS AND NATURAL OBLIGATIONS

112a. Formless agreements, or pacts, created moral obligations, which were available as defenses.

Pacts which modified an original enforceable contract became part of the contract itself, and could thus form the basis of an action. This, however, would be the case only if the pacts had been made before the original contract had been completed.

Certain special pacts (prætorian), connected in some way with other obligations, were made actionable by the prætor. These were *constitutum*, an agreement to pay a money debt already due, in a special way; *receptum argentariorum*, the creation of a bank credit in favor of a third person; and *receptum arbitri*, an agreement to abide by the award of a named arbiter.

Natural obligations were obligations, otherwise enforceable, which could not be sued on because of the existence of a specific disability or defense. Money paid or property transferred on a natural obligation could not be recovered.

An agreement which was not cast in the form of a stipulation, which was not executed by one of the parties, or which did not come within the group of the four consensual contracts, could not be sued upon. The fact that some promises could, therefore, be broken with impunity was made a reproach to the Roman Law during the Middle Ages, especially by the Canon lawyers, who contrasted with it their own insistence on the observance of all agreements as a matter of religious duty. Breach of this duty, *læsio fidei*, at one time seemed to be on the point of becoming a basis of ecclesiastical jurisdiction over most transactions.

The later Civil Law, however, took over the idea that all agreements, whether formal or formless, were equally binding, and found in the Roman sources many regulations and principles

to support them. In the first place, pacts were never wholly without effect. A moral obligation was always created by them. They were, therefore, available as a defence, the *exceptio pacti conventi* (supra, § 108).<sup>35</sup> If A. and B. had made an informal pact, and A. had performed his part, he could not thereafter change his mind and demand a rescission, either by recovery in a condictio (supra, § 109), or by *restitutio in integrum* (supra, § 23), or in any other way. In all such actions the defendant would oppose the *exceptio pacti*. Especially was this the case, if the pact changed the terms of a contract, so that the usual obligations were not to flow from it. A. may have sold an article to B. and then made a pact with him not to demand the money, but to be satisfied with a different sort of consideration. In a suit by A. *ex vendito* (supra, § 77), the pact—in this case *pactum de non petendo*—was a complete defense.

But further steps had been taken in the Roman Law in the direction of making all agreements binding. In the prætor's edict, the general announcement was made that all pacts would be maintained which were not illicit,<sup>36</sup> and Ulpian lays down the rule that "natural equity" required their observance.<sup>37</sup> The qualified validity granted to them was somewhat more than the very important rule that they could be used as the basis of an exception. In the case of most transactions, a great many matters are discussed and agreed upon in the course of negotiation. Each one of these, taken by itself, is a pact, and modifies, either by limiting or increasing, the usual obligations of the specific contract which is to be formed. We should prefer to say that the contract, when finally formed, contained a great many terms. The Romans, in general, preferred to treat these understandings as subsidiary agreements.

But pacts of this nature were the basis of an action as well as of an exception. Suppose A. had sold a house to B. for a def-

<sup>35</sup> G. 3, 179; D. 2, 14, 7, 5; C. 2, 3.

<sup>36</sup> D. 2, 14, 7, 7.

<sup>37</sup> D. 2, 14, 1, pr.

inite price and further agreed to put the house in a certain state of repair. B. can sue *ex empto*, if A. fails to repair it, precisely as he could if A. failed altogether in delivery. Or suppose B. has agreed, not only to pay the price, but also to guaranty a debt. A. can sue *ex vendito* if B. fails to guaranty, although the price has been duly tendered. And if, in the former case, B. refuses the house unless it is repaired, he can, of course, plead the *exceptio pacti*, if sued by A., while in the latter case A. can plead the same exception, if B. sues him.<sup>38</sup>

More commonly, instead of adding anything to the obligations of the main contract, as in the illustrations given, the pacts limited or narrowed these obligations. A. might promise delivery only in a certain place or at a certain time, B., the buyer, might promise to pay in installments or at a certain place or time. If the delivery were made otherwise than as agreed, the buyer could sue *ex empto*, just as he could if delivery was refused in spite of the tender of the installments when due.

All these illustrations are cases in which the subsidiary pacts are made in the course of negotiations; that is to say, they are really made before the main contract is completed, whether that main contract is a stipulation, a real or a consensual contract. Suppose they are made later. They are now certainly independent contracts, and, if they had been generally valid, a long step would have been taken toward creating a general class of consensual contracts. But a distinction was made here between pacts which increased the ordinary obligations of contracts and those which limited them. Both could be used as the basis of an exception, whether entered into before the main contract or after it. But only the latter could be sued on, if they were entered into after the main contract.

If, therefore, A. had sold the house to B. for a fixed price and subsequently promised to repair it, B. could plead the exception if A. sued for the price without having carried out his agreement. But, if B. had paid the price, he could not sue *ex empto* for A.'s

<sup>38</sup> D. 2, 14, 7, 5.

failure to repair. Similar statements could be made in the second case.<sup>39</sup>

But a special class of pacts had at a very early time been placed by the prætor in a particular category, and are for that reason called prætorian pacts. They were the *constitutum*, the *receptum argentariorum*, and the *receptum arbitri*.

The *constitutum* came into existence in the following cases: B. owes A. a sum of money now due. They agree that payment may be made at a future time. This pact is therefore a special case of the pacts already illustrated, made after the main contract. At the time the *constitutum* was introduced, no such pacts were actionable, whether increasing or limiting the ordinary terms. The prætor, however, in this special case, allowed a special action, *actio de pecunia constituta*.<sup>40</sup>

But the action also lay if X. had promised to pay B.'s debt to A.<sup>41</sup> In this case, it is wholly outside the class of ordinary pacts and, except for this action, could not have been sued upon at all. We may note that, at Common Law, X.'s promise would have been valid if A. had given B. time or discharged him, but that B.'s subsequent promise to pay his own existing debt at a later time would be invalid, unless new consideration were given.

The former case is practically a novation (infra, § 120); the latter, since B. continues to be liable,<sup>42</sup> is a case of suretyship (supra, § 103); but the *constitutum* could be used for other purposes. Natural obligations—that is, a type of moral obligation to be discussed more fully below—could be made legal obligations by a mere informal agreement that they were to be so, and actions barred by limitation (infra, § 137) could in this way be revived.

The *receptum argentariorum* was the agreement between a banker and A., whereby the banker undertook to pay a certain

<sup>39</sup> D. 2, 14, 7, 5; 2, 14, 41.

<sup>40</sup> D. 13, 5; C. 4, 18.

<sup>41</sup> D. 13, 5, 26.

<sup>42</sup> D. 13, 5, 28.



sum to B. This would have been invalid as a stipulation in most cases (*supra*, § 57). It was immaterial whether A. owed the sum to B. or not, and there need be no money of A.'s on deposit with a banker. If it had been in writing and in general use, it would have had some of the functions of a non-negotiable check or draft (*infra*, § 114). Justinian declared it to be identical with the *constitutum*.<sup>43</sup>

The *receptum arbitri* was the agreement to submit a controversy to arbitration. The enormous importance of this idea at the present day is largely due to the conditions of modern industry. At Roman Law, arbitration was not very fully developed, although it seems to have been encouraged. The *receptum* proper, the agreement between the parties and the arbiter, could not be enforced by an action, but merely by administrative act of the prætor, who would order the arbiter to deliver his decision. The agreement between the parties to abide by the reward of the arbiter, the *compromissum*, was generally put into the form of a penal stipulation and enforced in this way. But the decision of the arbiter was not a judgment and could not be enforced as such.<sup>44</sup>

#### *Natural obligations.*

The prætor permitted no action between father and emancipated son, or between freedman and patron. Obviously there was no possibility of action between *paterfamilias* and *filiusfamilias*, or between master and slave. Further, two *filiifamilias*, subject to the same father, could not sue each other.<sup>45</sup> Yet, if they were all adults, they might frequently enter into transactions which, but for this procedural difficulty, would have been legal obligations. To men with a fine sense of honor these would be as binding as legal obligations, and the Roman Law

<sup>43</sup> C. 4, 18, 2.

<sup>44</sup> D. 4, 8; C. 2, 55, 1; 2, 56.

<sup>45</sup> D. 12, 6, 38.

was content to leave their enforcement to a sense of honor. The bond, Papinian says, was a bond of equity (*supra*, § 42).<sup>46</sup>

However, the moral obligation thus created was sufficiently legal in its effect to establish an exception. If one side had performed under it, he could not repent of having acted equitably and recover the payment made or the property transferred. Whether the natural obligation was pleaded as an exception, or not, would not matter, if the facts appeared, the court would dismiss the complaint.<sup>47</sup>

Contracts entered into by wards or minors without the consent of their guardians (*supra*, § 41) created natural obligations. The same may be said in a number of other cases, in which a personal privilege might have been pleaded and barred an action. So a case is cited in which a well-founded claim is dismissed by the *iudex*. The defendant none the less pays. He cannot recover the money.<sup>48</sup>

A *constitutum*, or a formal novation (*infra*, § 120), would turn the natural obligation into a legal one, provided that the situation which originally barred recovery had since disappeared. The minor, on being freed from guardianship, might agree to pay his creditor. The freedman might similarly agree with his patron's successor in interest. Again, a natural obligation could be set off against a legal one (*infra*, § 120a), and could be secured by suretyship, pledge, or mortgage. The creditor would not be able to sue on the main obligation, but he could enforce the subsidiary remedies.

<sup>46</sup> D. 46, 3, 9, 4.

<sup>47</sup> D. 35, 1, 40, 3.

<sup>48</sup> D. 12, 6, 28.

## CHAPTER 15

THE LAW MERCHANT (*LEX MERCATORIA*)

## Section

- 113. Source of Modern Law Merchant.
- 114. Negotiable Instruments.
- 115. Bankruptcy.
- 116. Insurance.

## SOURCE OF MODERN LAW MERCHANT

113. The modern commercial law of both civil and common law systems was in the main derived from the mercantile customs of Western Europe of the times after Justinian.

Most of the countries whose law is derived from the Roman law have codes of commerce different from the ordinary Civil Codes. These codes of commerce contain provisions in which the ordinary civil law is modified by its application to merchants as a class. Such provisions ordinarily concern the law of sales and of partnership, or rather of association in general. Besides these there are several topics which do not appear in the Civil Code at all. The most important of these are insurance, bankruptcy, and negotiable instruments. There is besides, either as part of the code of commerce or in separate form, a code of maritime law.

The common-law countries have no separate codes of commerce, but the "law merchant" is a familiar concept, and its gradual reception into the body of the English law, especially during the seventeenth century, is one of the well-known facts of English legal history.<sup>1</sup> In both civil-law and common-law jurisdictions the rules of the law merchant are known to be de-

<sup>1</sup> 15 Holdsworth's History of English Law, 60-148. Cf. 3 Select Essays in Anglo-American Legal History, 7-97.

rived from the mercantile practices and statutes of communities which grew up after the complete decay of the Western Roman Empire. It is consequently natural enough that the problems of this commercial law or law merchant are insistent and engrossing problems in all modern systems, and equally natural that the Roman law seems to have completely ignored them, or treated them very inadequately.

### NEGOTIABLE INSTRUMENTS

#### 114. Written memoranda of stipulations were common (*cautiones*).

While transfer of obligations was known, negotiation, which is transfer free from latent equities, was unknown to the Roman law. When the bill of exchange was created, it received a new name, *cambium*.

Some instruments of the later law bear a superficial resemblance to the *cambium*.

When the mercantile law was studied by the civilians, they attempted to force its rules into the contract of mandate.

The legal and practical importance of such instruments as notes, bills of exchange, checks, bonds, in law and in everyday affairs, need not be insisted upon. It seems hard to think of business being successfully transacted without these aids. Yet it is indubitable that business of a kind and extent readily comparable with our own was transacted in the Roman Empire and especially in the eastern portions of it. Some of the advantages of commercial paper were obtained through *cautiones*, the memoranda of stipulations (cf. *supra*, § 54). These, like negotiable instruments, permit the exact extent of obligation to be known by a brief inspection of the document, and by the Aquilian stipulation (*infra*, § 119) a sum of money could be made the equivalent of any type of performance.

But what seems the most useful characteristic of negotiable instruments is their capacity of ready transfer. This adds to the utilizable wealth of a country the enormous element of credit, an indispensable element in any organized society. But a ready transfer of claims is impossible, if the validity of the claim is open to doubts, which cannot be cured, except by an elaborate investigation. Negotiation introduces the necessary security. The claim, when it comes into the hands of a third person, who is a *bona fide* holder for value, is free from latent equities; i. e., he need not concern himself about whether the claim is really valid, except as to three or four possibilities, which it is unnecessary to specify at this point. In the Continental systems even some of these possibilities may be disregarded.<sup>2</sup>

That this was a new concept for European law is indicated by the term *cambium*, which was devised for instruments like this when they came into common use. It was soon attempted to force the rules that govern the *cambium* into the framework of the mandate.<sup>3</sup> The glossators and commentators (*supra*, § 36) were especially active in this matter. Undoubtedly a mandate can be made to read like a bill of exchange, as, for example, when A. draws an order on B. to pay C. At Roman law, if B. in obedience to this mandate promises to pay C., he both becomes liable to C. by his promise and can claim reimbursement from A. This is apparently like an accepted draft, which renders the acceptor liable, and generally on payment gives him a claim against the maker. But the essence of the transaction lies,

<sup>2</sup> At the common law, if an indorsement is forged, the chain of title is broken, and subsequent holders have no claim on the instrument, although they may have rights against the indorsers after the forgery. N. I. L. § 23; Bill of Exchange Act, 7, 3; *Bank of England v. Vagliano*, [1891] App. Cas. 107. The rule was characterized by Lord Esher, whose view the House of Lords sustained, as "more convenient than just" (23 Q. B. Div. 249). In the German Code, Wechsel-Ordnung, § 75, 25 Commercial Laws of the World, 456, such an indorsement would not interrupt the chain of title.

<sup>3</sup> Borchardt-Jacobi in Weiske's *Rechtslexikon*, 14, p. 209 et seq.



not in this fact, but in the possibility of transference free from equities.

Transference, indeed, as far as it amounted to an assignment, could also be affected by means of a mandate (*supra*, § 107). Not only that, but there are many actual instruments which have survived from Roman times, and many references in the Digest in which it appears that the obligation, when originally created, was meant to run in favor of future transferees, as well as to the immediate obligee. That seems indicated by the phrase *eive ad quem ea res pertinebit*, or "to whomever the matter [i. e., the claim] may belong," which was a very common addition to promises to pay a specific person.<sup>4</sup>

Even from pre-Roman times, Hellenistic documents have come down to us in which a promise seems very clearly to run to future successors in interest of the promisee. As far as Egypt is concerned, papyri which almost in terms are promises to pay the bearer have been found and much discussed.<sup>5</sup> But all these documents and all the references in the Digest can be explained as instances of assignment, and in many of them the assignee acquires no right of action at all against the original obligor. Where he does, the peculiar character of negotiation, to wit, that he acquires a right free from latent equities, is almost surely absent.

All that we can say is that in Rome there were institutions in existence and legal ideas in operation which might easily have created negotiable paper, but that in all likelihood they were never developed in that direction. The idea of negotiability, when it emerges, is apparently as new as its name.

Even the earliest medieval writers knew that in the bill of exchange something new had been invented. Yet, whenever any of the special mercantile customs needed authority, recourse was

<sup>4</sup> D. 12, 1, 40; 46, 2, 11.

<sup>5</sup> Goldschmidt, *Zeitschrift der Savigny Stiftung Röm. Abt.* 10, p. 368 et seq. Freundt, *Wertpapiere im antiken und frühmittelalterlichen Recht*, 2, p. 12 et seq.; Mittels, *Zeit, der Sav. Stift. Röm. Abt.* 19, p. 250.

had to the *Corpus*. So to explain the obligation of the maker of a bill, if it was dishonored the stipulation was assumed, *nisi faciet, quanti ea res sit præstabo*, from Digest, 45, 1, 38, 1, i. e. —“If he does not pay, I will make good the amount.” Or the discharge of intermediate indorsers by a second indorsement of one already liable on the instrument was referred to the rule, *dolo facit qui petit quod redditurus est* (Digest 44, 4, 8, pr.)—“It is fraud to make a claim for what you are under an obligation to return.”

### BANKRUPTCY

115. Fraud on creditors was prevented at Roman law by several actions.

Creditors might also insist on an assignment for their benefit, *cessio bonorum*, the appointment of a receiver elected by them *curator, magister*, and a sale of the insolvent's property.

At first the purchaser, *bonorum emptor*, assumed the bankrupt's liabilities. Under Justinian, he merely bought the goods and the purchase price was distributed.

The bankrupt became *infamis*. However, he had an exemption, *beneficium competentiæ*, but he was not discharged.

Modern bankruptcy has two purposes. The first is to distribute the insolvent's assets among all his creditors and prevent an accidentally prior creditor from getting an unjust preference. The second is to permit an honest, but unfortunate, debtor to resume business freed from the load of old debts which he cannot discharge.

The Romans had a well worked out system, which we might call one of bankruptcy. There was a suit at law for acts done in fraud of creditors, a special interdict, and a claim for *restitutio in integrum* as well *actio Pauliana* (supra, § 52).

But the proceedings resembled our bankruptcy methods even

more closely. The insolvent debtor of his own motion (voluntary bankruptcy) might offer to transfer his whole estate for the benefit of creditors (*cessio bonorum*). Or else several creditors, either because of an act in fraud of their claims, or after some other "act of bankruptcy," might demand such a transfer. Under direction of the prætor, the creditors are ordered to meet and elect one of their number as manager, *magister* in the earlier law, "*curator*" under special circumstances, as generally was the case under Justinian. The *magister* or *curator*, however, does not, like a trustee, obtain the title to the property. He does, however, obtain the power to convey a good title to a vendee.<sup>6</sup>

In the classical law, the *magister* advertised the property for sale—the notice being posted in the Forum on one of the famous structures, the *columna Mænia*.<sup>7</sup> He then sold (*bonorum venditio*), not the individual pieces, but the whole estate of the bankrupt to the highest bidder, the *bonorum emptor*, who succeeded to all the right, title, and interest of the bankrupt. His bid was not of money, but of a dividend, the person who promised the largest dividend being successful.<sup>8</sup>

The *magister bonorum* could collect the bankrupt's claims by suing the latter's debtors by the so-called Rutilian *formula*. If the bankrupt was dead, he used the Servian action, in which he claimed "as if heir."<sup>9</sup>

Justinian abolished this form of *bonorum venditio*. The *curator* sold the property of the bankrupt for the best price he could get and distributed the proceeds. Only creditors with claims evidenced by documents could share, but they were allowed two, and when some of the parties were not residents four, years to reduce their claims to the necessary form.<sup>10</sup>

<sup>6</sup> D. 42, 3; 42, 5, 15; 42, 7, 2; G. 3, 79; C. 7, 71.

<sup>7</sup> Pliny, Hist. Nat. 7, 60.

<sup>8</sup> A full account of the details of the procedure is given in Mr. E. Poste's edition of Gaius (4th Ed.) p. 302 et seq.

<sup>9</sup> G. 4, 35.

<sup>10</sup> I. 3, 12; C. 7, 72, 10.

Voluntary bankruptcy—*cessio bonorum*—was encouraged. The bankrupt in this way avoided execution against his person, which at all times seems to have been the normal form of execution against a judgment debtor. He further escaped legal infamy (*supra*, § 47).

One of the two principal purposes of bankruptcy statutes was consequently well enough provided for. But the other one, the humane purpose of discharging an unfortunate debtor, seems not to have been considered either as desirable or as a proper inference from the provisions for the prevention of fraud on creditors.

By *cessio bonorum* the bankrupt received advantages already named. Further, he was not liable for the fraction of his debts which remained unpaid, except as far as his after-acquired property exceeded his needs. He had a *beneficium competentiae* (*supra*, § 96). A complete discharge, as in our bankruptcy law, was not accorded to a debtor, however honest and unfortunate.

An involuntary bankrupt became *infamis*. If there was any fraud involved, he subjected himself to both civil and criminal liability.

It may be noticed that the term used here was *in fraudem*, and that the expression in the prætor's edict was *fraudandi causa*, not *dolo malo*. The fraud on creditors which makes a conveyance invalid in our law was apparently taken from these sources, and the use of the term "fraud" to cover both such cases and willful wrong has caused confusion. We have been compelled to invent a category like "legal fraud" to account for it.<sup>11</sup> The case cited in the Digest from Ulpian presents the problem, so often discussed in our cases, of a conveyance by a debtor which leaves him without property, when no positive evidence can be offered of fraudulent intention, *consilium fraudandi*. Ulpian decides, as our courts do, that a man who makes such a conveyance must be assumed to have this intention, and that even if

<sup>11</sup> D. 42, 8; C. 7, 75.

the grantee can be shown to have no knowledge of such a purpose.<sup>12</sup>

Discharge of a bankrupt is a privilege for which a statute is necessary, as has been found to be the case in all communities that permit it. Whether this dangerous privilege, so frequently and so grossly abused, could be surrounded with greater safeguards than we have succeeded in putting about it, may well be doubted. Perhaps we should have to come to the same conclusions as those which apparently animated the framers of our bankruptcy statutes, that the net result is the distribution of the risks of a mercantile enterprise over the mercantile community as a whole, and that the advantage of this result outweighs the dangers inherent in it.

### INSURANCE

116. Bottomry loans (*fenus nauticum*), in which the loan was discharged if the ship did not arrive, were of long standing.

Conditional contracts were frequent, but pure speculation (*alea*) was discouraged.

There is nothing to indicate that risks now insured against were treated as legitimate speculation.

Life insurance was rendered difficult by the form of the stipulation, and apparently was less needed under Roman economic conditions.

What would the Roman law have done with insurance? The bottomry loan, the *fenus nauticum*, was a familiar concept. A title in the Digest and one in the Code are concerned with it.<sup>13</sup> Men lent money to merchants engaged in foreign trade on the special condition that, if the ship was lost, the loan was discharged. For this extraordinary risk the ordinary usury laws had no application. Such a loan, in theory, was possible with almost any condition attached. Scævola (supra, § 31) makes a

<sup>12</sup> D. 42, 8, 10.

<sup>13</sup> D. 22, 2; C. 4, 33.



general institution of it, asserting that a promise may be made with any condition whatever as a penalty for nonperformance. Speculation, consequently, was perfectly legitimate, and one of Scævola's illustrations is the lending of money to a fisherman, to be repaid with interest only out of the catch. Yet there are very few detailed instances given, except in connection with maritime loans, and the examples of Scævola have the air of supposititious cases.<sup>14</sup>

But even Scævola's conditional contract is not an insurance contract. He restricts his permitted contracts to those that fall short of gambling—*si modo in aleæ speciem non cadat*—although Pomponius admits that the sale of a future catch of fish, like the sale of an expectancy in general, is a sort of gambling, *quasi alea*. Now, despite earnest efforts to prove the contrary, insurance contracts are a sort of gambling, and, although the validity of gambling contracts as such at Rome is somewhat doubtful,<sup>15</sup> it is easy to see how by an interchange of stipulations, with appropriate conditions, every form of our insurance contracts except that of life insurance could be provided for. Yet apparently, though risks of theft, of accidental destruction, are described in all Latin literature as very common, this type of protection was not utilized.

It is a common thing to find, as illustrations of conditions in contracts, the expression "if the ship arrives," or "if the ship does not arrive." These have probably nothing to do with insurance contracts, but are general examples of conditions.<sup>16</sup>

As to life insurance, the forms developed by the Roman law would oppose an extraordinary resistance. The purpose of life insurance is to provide for a beneficiary, and that is just what could not be done by the ordinary Roman contract, the stipulation. By a little indirection, however, something like a life insurance contract could be arranged. A. could stipulate to have

<sup>14</sup> D. 22, 2, 5.

<sup>15</sup> D. 22, 3, 19, 4; D. 11, 5, 3; C. 3, 43, 1.

<sup>16</sup> I. 3, 19, 14.

a sum paid him at his death, and couple this with a provision in his will which bequeathed this claim to the beneficiary. This would be both awkward and inadequate, since there was no way of making the right of the beneficiary irrevocable.

Whether this could be done or not, it is not likely that it ever was. The need for such insurance was rendered less imperative by the existence of a restriction on testation, by the dotal system, which provided for the wife, and by an elaborate system of compulsory guardianship of orphans and incompetents.

## CHAPTER 16

### CREATION AND EXTINCTION OF OBLIGATIONS

#### Section

- 117. Résumé of Obligatory Transactions.
- 118. Obligations Created by Relations of Persons, Property and Succession.
- 119. Extinction of Obligations.
- 120. Novation.
- 120a. *Compensatio*.

### RÉSUMÉ OF OBLIGATORY TRANSACTIONS

117. Obligations are created: (1) By formal stipulation; (2) by four classes of agreement; (3) by the delivery of a *res*, or by the performance of an act; (4) a mere agreement of any sort may modify obligations; (5) a legal obligation, unenforceable because of a personal privilege, remains a natural obligation; (6) the unjustified retention of property or the benefit of services created a quasi contractual obligation; (7) a wrongful act creates the obligation to compensate; (8) in special cases, wrongful act of a third person creates such an obligation.

In the preceding pages the attempt has been made to examine all the methods used by the Romans in order to create binding obligations between two or more persons. They may be summarized as follows:

(1) Obligations resulting from certain formal acts. A. stipulates, and B. promises. B. is bound to A., and the obligation may be enforced by a *condiction*, or an action *ex stipulatu*.

(2) Obligations resulting from certain special agreement:  
 (a) Sale-purchase—*emptio-venditio*. Two obligations

arise when A. and B. are agreed on a definite *res* and a definite price. The seller's obligation is enforced by an action *ex empto*, and by the warranty actions *redhibitoria* and *æstimatoria*. The buyer's obligation is enforced by the action *ex vendito* and later by the action to rescind for lesion.

(b) Letting-hiring—*locatio-conductio*. Two obligations arise when A. and B. are agreed on a definite *res* and a definite rent. The actions are the actions *ex conducto*, and *ex locato*.

(c) Partnership (*societas*). Two obligations arise when A. and B. agree to manage some *res* jointly or engage jointly in some transaction. Either may enforce the obligation by the action *pro socio*.

(d) Mandate. Two obligations arise when A. gives B. instructions to act in a certain way. The actions are the direct and contrary actions of mandate. By a mandate made between A. and B. obligations may be created between A. and C. as well, when the instructions require B. to enter into obligations with C. These obligations are enforced by adapted actions and actions based on the institory action.

(3) Obligations arising from the delivery of a *res*:

(a) Loan for consumption—*mutuum*. The obligation arises when A. transfers to B. a certain quantity of fungible goods, generally money, to be returned in kind. A. may sue B. in a condictio.

(b) Loan for use—*commodatum*. Two obligations arise when A. transfers a *res* to B., to be used gratuitously. The actions are the direct and contrary actions of *commodatum*.

(c) Deposit. Two obligations arise when A. puts a *res* in B.'s control for safe-keeping. The actions are the direct and contrary actions of deposit.

(d) *Pignus*. Two obligations arise, when A., a debtor, puts a *res* in B.'s (the creditor's) control as security for the

debt. The actions are the direct and contrary pledge actions.

(e) Innominate contracts:

(I) *Do ut des; do ut facias*. An obligation arises when A. transfers a *res* to B. in reasonable expectation of counter performance on B.'s part. The action is the *actio in factum præscriptis verbis*.

(II) *Facio ut des; facio ut facias*. An obligation arises when A. performs some act in reasonable expectation of counter performance on B.'s part. If the *actio in factum* does not lie, an action for *dolus* will.

(4) *Pacta*. Agreements which did not come into the above classes did not create enforceable obligations, but they could modify and practically destroy obligations. The common terms of all previously listed obligations might be varied at will by such *pacta*, and only the terms as varied could then be enforced. Further, of themselves they created something like a moral obligation which would serve as a defense against any attempt to recover what was paid in accordance with a pact. The rule is generally stated that a pact does not create an obligation, but does create an exception.<sup>1</sup>

(5) Natural obligations. Transactions which would create legal obligations, except for the existence of some personal privilege; infancy, the *senatus consultum Macedonianum*, the relation of master and slave, etc., will create at least a natural obligation, and payment of such an obligation is not recoverable in quasi contract.

(6) Quasi contracts:

(a) Unjustified retention. An obligation arises when B. has obtained control of A.'s property without being able to show a just reason for keeping it. A moral reason or a pact are sufficient justification. The action is the *condiction*.

<sup>1</sup> D. 2, 14, 7, 4.



(b) *Negotiorum gestio*. Two obligations arise when A., without a request from B., manages B.'s affairs in a *bona fide* attempt to do him a necessary service. The actions are the direct and contrary actions of *negotiorum gestorum*.

(7) Obligations created by wrongful acts:

(a) A trespasses to persons or theft of property created an obligation to pay a penal sum to the person injured. The older trespasses had specific names, which gave names to the actions (*actio furti; iniuriarum*).

(b) Any willful trespass to property created an obligation to compensate, with certain penal incidents (*actio legis Aquiliæ*).

(c) If the wrong did not come within any named category, an action of *dolus* enforced compensation by threat of a penalty (*actio doli*).

(8) Obligations created by wrongful acts of third persons.

(a) Any damage done by objects falling from a building created an obligation to compensate injured person on the owner or legal occupant of the building.

(b) Trespasses to property done by servants of innkeepers or carriers obligated the latter to compensation or penalty, as well as the tort-feasor.

## OBLIGATIONS CREATED BY RELATIONS OF PERSONS, PROPERTY, AND SUCCESSION

118. Obligations are also created as incidents of (9) the various personal relations; (10) the relations of property; and (11) the relations of succession. These obligations are of precisely the same character as those created by the transactions previously listed.

But, although contract, quasi contract, delict, and quasi delict are the common categories into which obligations are attempted

to be placed in the Roman sources, there are at least three other sources of obligations which are as fertile in actions at law as these. These are the obligations arising from the personal relations discussed in chapter 3 and in the special relations of property and succession to be discussed in the following chapters. They cannot be omitted, if we are attempting to examine even the commonest of the obligatory transactions of the Roman law, although they can merely be referred to here.

It might be possible to classify all of them as quasi contracts, but it is better to deal with them separately:

(9) Obligations arising out of the personal relations. The relation of husband and wife created obligations especially in regard to the *dos*, enforced in the *actio rei uxoriæ*. The relation of guardian and ward created mutual obligations enforced by the direct and contrary actions of *tutela*. The relation of master and slave created no obligations between the two parties, but created obligations between the master and third persons, enforced by the noxal actions, the *actio institutoria*, and by the actions *de peculio*, *in rem verso*, and *quod iussu*. To a less degree the same may be said of the relation of father and child.

(10) Obligations of property relations:

(a) The ownership of a *res* (*dominium*) creates obligations on the part of most persons to surrender it to the owner. The obligation is enforced by a vindication or by a condition.

(b) The *ius possessionis*—"right to possess"—creates analogous rights in a possessor. They are enforced by the Publican action, by the interdicts, and in special cases by the Servian action, simple or adapted. Mortgages and pledges are similarly protected. Co-ownership creates an obligation to protect the *res* and a right to an equitable division. The action is the *actio communi dividundo*.

(c) The easement or servitude creates rights in the property of other persons, enforced by possessory remedies and by the actions called *confessoria* and *negatoria*.

(11) Obligations created by succession. The death of a *paterfamilias* creates obligations between his successor, the *heres*, his legatees and beneficiaries, and his creditors, enforced in a great many ways by different actions.

## EXTINCTION OF OBLIGATIONS

119. Obligations were extinguished (a) by performance, either by the debtor or a third person; (b) by *acceptilatio*—an agreement like accord and satisfaction. This agreement might refer either to a specific debt or might be in full satisfaction of all debts.

As has been stated, an obligation once created can really and properly be ended only by performance. The chain (*vinculum*) is thereby broken (*solvitur*). (Supra, § 42). But there is one important matter to note. The performance need not be made by the actual debtor.<sup>2</sup> It is the owner of the obligation who is primarily considered. If the thing to which he can properly lay a claim is obtained by him, the obligation is completely gone.

A volunteer, accordingly, could pay a debt, which would completely extinguish it, and he could do so, not only without the debtor's authorization, but without his knowledge, and even against his will. The last fact might seriously affect the right of the volunteer to be reimbursed by the debtor, but would none the less wipe out the obligation.

The point of view may be shown in the following illustration: A. owes a slave to B., and by way of payment transfers a slave who is really the property of C. The prescriptive period elapses, and B. thereby becomes the owner of the slave. A.'s debt is canceled by performance.<sup>3</sup>

<sup>2</sup> I. 3, 29, 4; D. 46, 3, 53. But cf. D. 46, 3, 91.

<sup>3</sup> D. 46, 3, 60.

Other ways of ending an obligation in practice soon became common. In the first place, the obligation may lapse, although, as we have seen, that concept was not an easy one to the older jurists, and seemed to consist in barring the remedy.

In the same way an agreement might be made not to sue,<sup>4</sup> and if such an agreement were made, even by a mere pact, its existence effectually ended the obligation in fact, if not in theory, since it is asserted as a general rule that a right of action to which a perpetual exception may be interposed is really gone.<sup>5</sup>

As far as consensual contracts were concerned, the agreement which sufficed to create them was capable of ending the obligations brought into existence by them. If there had been no performance on either side—even partial performance—an agreement to rescind might be made, *contrarius consensus*, or such an agreement could be inferred from the conduct of the parties.\*

But, just as actual performance will necessarily and inevitably end the obligation, so there can be no doubt that the two parties may bind themselves to call a certain conduct actual performance. Performance of this character, *acceptilatio*, is very much like the accord and satisfaction of the common law. The simplest way to do so is by stipulation.<sup>6</sup>

Since the *acceptilatio* was a performance, it might not add any terms to itself. The formal question was, "Do you acknowledge receipt of what I owe you?" to which the proper response was, "I do." Evidently one could not say this conditionally and retain the effect of the transaction.

But it is clear that the refinements of the common law in regard to accord and satisfaction have no place here. Since consideration played no part in determining the validity of a contract, there was no reason why a large debt could not be discharged by a small payment.

<sup>4</sup> D. 2, 14, 7, 8; I. 4, 13, 9.

<sup>5</sup> D. 12, 6, 26, 3.

\* I. 3, 29, 4; D. 18, 5, 2; 18, 5, 3; 18, 5, 58.

<sup>6</sup> I. 3, 29, 1; D. 46, 4; C. 8, 44.

A special *acceptilatio* could be made by means of a stipulation introduced by Aquilius (supra, § 24), and therefore called the Aquilian stipulation. This effected a discharge of all obligations in existence at the time, and could be so phrased as to include all but those specially named. It was a convenient way of clearing up accounts and seems to have been frequently used.<sup>7</sup>

It will be noted that all forms of discharge could be used for any type of obligation, whether based on contract or delict, or arising from property and personal relations.

## NOVATION

120. Novation at Roman law might be the substitution of a new debt between debtor and creditor in lieu of the old one. It was further used, as in the common law, to refer to the transaction whereby in a subsisting debt a new debtor or a new creditor is introduced. In that sense it was also called delegation. It often operated to wipe out defenses.

The Aquilian stipulation discharged all obligations except those specified. In this way, it might serve to substitute a new obligation, definite and clear in kind and amount, for an indefinite group of claims. This substitution of a liquidated claim for previously unliquidated or disputed ones was a type of novation. The parties remain the same, but the obligation is a new one, and the effect of creating this new one is to discharge the old ones. Any obligation, whether binding in law or not, may by an agreement to novate be turned into any other sort, and only the new obligation will be in force.<sup>8</sup>

<sup>7</sup> I. 3, 29, 2; D. 46, 4, 18.

<sup>8</sup> I. 3, 29, 3; D. 46, 2, 1.



It was, however, no novation if a new form is given to an identical debt. If A. had borrowed money of B. and before or after the loan had promised this same sum to B. by stipulation, there was properly no novation at all. But if other obligations, such as those arising from legacy or similar transactions, are put in stipulation form, only the stipulation is binding, and the defenses or qualifications that would exist in case of a suit on the legacy have no effect.<sup>9</sup>

Differing from an *acceptilatio*, a novation may introduce any terms or conditions that are desired. This type of novation is frequent in the civil-law systems. At the common law, the term implies a different sort of arrangement, also in use in the civil law, whereby the debt is unchanged, but a new debtor or creditor is substituted for the old one.

Apparently, novations of this second type were less common at Roman law. The technical term for them is "*delegatio*," but novation is also used, and for our purposes may be preferred.<sup>10</sup>

A novation of this type can be created by agreement between the original debtor and creditor, and carries with it only the actual claims, not the defenses that may exist. For example, A. owes B. a sum of money on a stipulation, but could have prevented collection of the sum by the existence of an agreement on B.'s part not to sue, a fact known to A. as well as B. A., B., and X. agree that X. shall assume A.'s debt. X. cannot use the agreement as a defense, and the transaction is treated as a voluntary surrender by A. of the defense in question.<sup>11</sup>

It is obvious that all persons involved must consent to the transaction. If B. assigned his claim against A. to X. by mandate, or by sale of the claim (*venditio nominis*), X. may sue, although A. is wholly ignorant of the assignment. But if a novation takes place, in which X. becomes the creditor in B.'s place,

<sup>9</sup> D. 46, 2, 2.

<sup>10</sup> D. 46, 2, 11; 46, 2, 12, 15.

<sup>11</sup> D. 46, 2, 19.

so as to remove B. entirely from the transaction, it must be assented to by A.<sup>12</sup>

### COMPENSATIO.

120a. *Compensatio* was equivalent to the offset of the Common Law. It was at first allowed only in *bonæ fidei iudicia*, and later could be pleaded in *stricti iuris iudicia* by the exception of *dolus*.

For a long while, the successful plea of *compensatio* caused a dismissal of the complaint. Later, it merely reduced the claim.

If A. has a valid claim against B. for 100 hs. and B. has a claim against A. for the same amount, it is evidently to the interest of both to balance one claim against the other, and it is certainly a dictate of common sense to do so. We may say, therefore, that the coexistence of these two claims extinguishes both of them. The technical term for this was *compensatio*, and the Common Law equivalent is obviously the offset. In *bonæ fidei iudicia* (supra, § 64), *compensatio* was a matter of course. The *iudex* was instructed to give the plaintiff what in good faith he ought to get, and no more. After Marcus Aurelius (supra, § 5), it was permitted in *stricti iuris iudicia* as well, if pleaded evidently by the exception of *dolus* (supra, § 24). Normally, the effect of such an exception would be that the complaint was dismissed, even if the offset was much less than the claim. This was somewhat drastic, and its practical effect must have been to exercise a powerful pressure on litigants to settle their cross-accounts between themselves. But later, and certainly at the time of Justinian, the effect of the *compensatio* was merely that of reducing the claim *pro tanto*.

It is not certain that the *compensatio* ever grew into a real counterclaim, so that, if it was larger than the claim, the case

<sup>12</sup> D. 18, 4, 17; C. 4, 10, 7.

might result in an affirmative judgment for the defendant. The formulary procedure would make such a result practically impossible, but under the cognition procedure there would have been no difficulty in rendering judgment for either side.<sup>13</sup>

It is notable and characteristic that the natural obligations (*supra*, § 112a) could be used by way of *compensatio*.

<sup>13</sup> G. 4, 64-66, 68; D. 16, 2; I. 4, 6, 30.

## CHAPTER 17

## GENERAL NATURE OF PROPERTY AND OWNERSHIP

## Section

- 121. Ancient Classification of Property.
- 122. Other Classifications.
- 123. Characteristics of the Law of Property.
- 124. *Proprietas*.
- 125. Actions to Test Title.

## ANCIENT CLASSIFICATION OF PROPERTY

121. The "law of things" has always seemed the oldest part of the law and particularly apt to be first classified.

In England, the historical classification is "real" and "personal" property. At the ancient Roman Law, it was "*res Mancipi*" and "*nec Mancipi*." This became obsolete in imperial times and lost its importance early.

"All the law which we use," the Institutes of Gaius assert, "concerns either persons or things or actions."<sup>1</sup> These words are literally copied by Justinian, and the classification in some modified form has remained the fundamental division of law in all the civil-law systems.<sup>2</sup>

<sup>1</sup> G. 1, 8.

<sup>2</sup> I. 1, 2, 12. The French Code Civil has the following divisions: Book I, Persons; Book II, Things; Book III, Means of Acquiring Property. The German Bürgerliches Gesetzbuch (B. b. B.), after a general introduction in Book I, has Book II, Obligations; Book III, Things; Book IV, Family (Persons); and Book V, Succession. The Swiss Code has Part I, Persons; Part II, Family; Part III, Succession; Part IV, Things; and a separate code for Obligations.

The law which pertains to things is further divided. Some things are corporeal, others incorporeal, and among incorporeal things obligations are expressly placed, as are inheritances and testamentary successions.<sup>3</sup>

The scientific difficulties of the division were perfectly clear to Gaius. All law is inevitably a law pertaining to persons, and a very great deal of what is specifically called the "law of persons" is a law pertaining to things. The purpose of most of the obligations we have examined is the exercise of some sort of power over concrete objects. Certainly the "real" contracts proclaim that in their name, and sale and letting do so no less in their more important applications.

And yet the classification is not a purely traditional one. It was a successful attempt to cut through a chaotic mass of material that had been collected from practice and commentary, and it was a logical feat of considerable importance to have accomplished it, however and whenever it was done. "Ownership," "use," "enjoyment," are relations between persons in respect of things, relations that are common to many situations, and it is highly proper to deal with these elements separately, before the special situations in which they occur are considered.

But that the main body of the law is the "law of things" is a tradition—perhaps an inevitable tradition—of organized societies. Each important class of things becomes the center of legal customs, and it would have been conceivable that all possible situations to be dealt with in courts should be grouped about the concrete things they referred to.

In England, the social and political importance of landed property made land an obvious center for such grouping. The "law of real property" takes up pretty completely all transactions in which land is involved. Contracts in relation to land, injuries caused by deterioration or occupation of land, were treated under this head, as well as the more general question about degrees of ownership, possession, and user. Logically

<sup>3</sup> I. 1, 2, 2.



the law of nonlanded property could be treated in the same way, and the two classes would exhaust almost all the law; but here we find new categories, that disregard subject-matter, the categories named contracts, sales, torts, agency, and the like.

In recent times economic importance has reclassified certain groups. We have text-books on the Law of Mines, of Oil, of Automobiles, each one being a fairly complete summary of the law as it affects these several classes of things. If any one of these things should ever attain the overwhelming importance of land in medieval and modern England, it is plain that the law of that particular thing would not be merely the title of a text-book, but an important category, in which lawyers and courts would almost instinctively classify the legal doctrines they set forth.

The Roman law began with a classification that had a similar economic origin. A category of things was called *res Mancipi*. It consisted of Italian land, certain rights of user over Italian land, slaves, cattle, and horses. These things were transferred by an elaborate ceremony, called mancipation. No other thing could be so transferred, and all other things were therefore called *res nec Mancipi*.<sup>4</sup> Formally, the classification lasted centuries after its practical importance had disappeared, but long before Justinian it had become an obsolete curiosity, much as copyholds and fees tail are in America.

No classification really took its place. Of the many classes of things that are mentioned in the title of the Institutes and Digests, none have much legal significance, beyond the few cases in which certain pieces of property were for a longer or shorter time withdrawn from ordinary commercial transactions, because they were public or quasi public.

<sup>4</sup> G. 2, 14, 27; Ulpian, *Regulæ*, 19, 1.

## OTHER CLASSIFICATIONS

122. Later classifications, as between things capable and incapable of private ownership, were of very slight importance.

There was a distinction in practice between movables and immovables, but almost none in legal theory.

The distinction between things "in patrimony" and things "outside of patrimony" is treated more fully in the sources than its importance justifies. Some things were sacred, because the property of temples and later of churches, some consecrated, being the walls and gates of the city, and some "religious," because they were concerned with the burial of the dead. All these were "outside of patrimony"; i. e., could not be bought or sold, or form part of a man's assets. Again, there were public things "outside of patrimony," things common to all, such as the air, the sea, the seashore, and flowing rivers.<sup>5</sup>

In the latter case it is rather the use of the river that is common, and there are traces of the idea that the title to the seashore is vested in the state. That is apparently also the theory as to provincial land, title to which is often said to be in the state, or in the emperor. Such land is, therefore, capable only of quasi ownership—"tenure"—in the hands of any person or corporation.

Besides things holy or quasi holy, and things common to all, there were also "public" things, things which were owned by the various public corporations which existed. This class of corporations was chiefly represented by the many municipalities, all of which had corporate organization, and in such corporate capacity owned considerable property, theaters, stadia, public markets, and the like. There is no real difference between things of this sort and things owned by other corporations, particularly the quasi public corporations, which had certain exceptional

<sup>5</sup> I. 2, 1, pr. 2; D. 1, 8.

privileges because of their functions, and the associations that formed the revenue or managed the mines (*supra*, § 100).

Indeed, it may be said that, when there ceased to be a difference in the power of transferring or acquiring different classes of things, there ceased to be much legal justification for classifying them.

The distinction between movables and immovables, despite its transcendent practical importance, was not made the basis of a legal classification. In practice, however, we may be sure land was treated as a very different thing from a transportable chattel, and, in the modern systems of Europe, transactions involving immovables are subjected to a very large number of special rules. This is doubtless in part due to the fact that Europe has only recently emerged from a feudal organization, with its violent emphasis on land tenures.

## CHARACTERISTICS OF THE LAW OF PROPERTY

123. The law of obligations stresses claims; the law of property stresses privileges.

*Dominium* was a group of privileges, often summarized as the right of use, enjoyment, and misuse—*usus fructus abusus*.

The most ancient *dominium* was called Quiritary ownership. It varied in content from almost unlimited capacity of user to a shadowy nominal title.

A type of *dominium* which contained all beneficial rights, except the nominal Quiritary title, was called bonitary ownership.

The "law of property," the law of "things," might justify a separate treatment for a wholly different reason. We generally think of an obligation as the most characteristic of legal relations—the situation in which one person is tied up with reference to another, so that a given act is the only method of loosing the bond. We have taken up one way after another in which

this tying up is effected, and found that, in spite of notable exceptions, they correspond fairly closely to the methods still in vogue to secure this same result. But in old Roman law the first suggestion of *ius* was something quite different. The *ius Quiritium*, the peculiar right of a Roman, was a summary statement of the fact that a Roman, and only a Roman, could without legal let or hindrance perform a number of acts about these things of which he asserted such a *ius*. He was *dominus*, the house master, just as he was *paterfamilias*, the head of the household. The *ius Quiritium* was his privilege, in the strictest sense of the word, that range of possible activities which could form the basis of no suit at law against him in Roman court.

What was this range of possible activities? It is described in very absolute terms, and is said to consist of the *ius utendi fruendi abutendi*; the privilege, that is, of using a *res* while keeping its corpus intact (*utendi*), of using it by diminishing its corpus or its outgrowths (*fruendi*), of completely consuming it, and therefore ending its effective existence as that particular *res* (*abutendi*).<sup>6</sup> These are three degrees of a process of exercising power over a concrete object, and if *dominium*—"ownership," "title," "property"—meant just this sum of *iura* and no other, it would be perfectly clear.

Full *dominium* we are in the habit of calling Quiritary ownership, and such Quiritary ownership was strictly possible only of those things which were *res Mancipi*. Of *res nec Mancipi*—and, as we shall see, of *res Mancipi* informally transferred—an ownership quite as good in practice as a Quiritary title existed. The property was *in bonis*; it was part of the assets, because the prætor would protect it just as fully as he would a Quiritary title. The term "bonitary" ownership is used for this sort of *dominium*, and it possessed all the complex of relations, and all the privileges of use and consumption, that the other did.<sup>7</sup>

However, *dominium* in this exclusive sense, really existed only

<sup>6</sup> C. 5, 12, 19.

<sup>7</sup> G. 2, 40, 41.

in respect of some objects and by no means of all. It fell a good deal short of containing all possible activities in connection with the two economically most important kinds of *res*, slaves and land. At any rate, beginning with the Empire, ill treatment of slaves was increasingly limited and the killing of them wholly prohibited.<sup>8</sup> Land was subjected to a number of restrictions by the presence of neighbors, especially if the neighboring property was a public road.<sup>9</sup> By a *senatus consultum* of 43 A. D. buildings might not be destroyed for the purpose of speculation in land.<sup>10</sup> Indeed, it may be seen that the *ius utendi fruendi abutendi*, by virtue of its climactic arrangement, is rather an analysis of the idea of ownership than a real statement of what the elements of Roman *dominium* actually were.

Not only did the elements of abstract *dominium* vary with the objects on which it was exercised, but they varied with the relations of the persons affected. Tutors were called *domini* when they did certain things, and not when they did others.<sup>11</sup> Those who had restricted rights over a thing were called *domini*, when that particular complex of right was considered.<sup>12</sup> To what *dominium* might be reduced may be seen by considering the *res Mancipi*. These, as has been said, were things which could be transferred only by a special and elaborate ceremony called mancipation. Suppose they were transferred, and the ceremony for one reason or another was omitted. The acquirer would be protected in his "title." If it was a thing which by its nature was susceptible of *usus fructus abusus*, he might completely and wantonly destroy it or consume it, without leaving the former owner any claim enforceable in a court. Yet all this time the former owner was the *dominus*; he held the *dominium*

<sup>8</sup> Buckland, Text-Book of Roman Law, p. 64 et seq.; I. 1, 8, 2.

<sup>9</sup> D. 43, 8, 2.

<sup>10</sup> C. I. L. X. 1401; Riccobono, Fontes Iuris Anteiustiniani, I, p. 233.

<sup>11</sup> D. 26, 7, 27; 41, 4, 7, 3; 47, 2, 56 (57), 4.

<sup>12</sup> D. 42, 5, 8, pr.; 7, 6, 3.



*ex iure Quiritium*. Maitland called his "title" the driest of dry trusts conceivable. So it certainly was, but equally certainly it was as much *dominium* as before the transfer was attempted.<sup>13</sup>

### PROPRIETAS

124. The term *proprietas*, "property," is sometimes used as a synonym of *dominium*, and sometimes for *dominium* with certain rights of user deducted. This is particularly common in easements.

A word which is frequently used with *dominium* is *proprietas*, but more frequently *proprietas* has a special meaning. It denotes what is left when various rights of use and enjoyment are taken from the *dominus* and conferred upon others. These uses might be considerable. By usufruct, by *emphyteusis*, a person not the *dominus* might have privileges in connection with a *res* which all but exhaust the benefits that could be derived from it. But the point was that they did not quite do so. Something was left, and that something was the *proprietas*. This was a real thing, and not, like the Quiritary title, an "empty and superfluous word," as it is called in Justinian's constitution (C. 7, 25), which had no concrete existence as far as producing effects was concerned. The owner of the residuum was properly called the *dominus proprietatis*.<sup>14</sup>

But the characteristic of *proprietas* was really a different thing from that of *dominium*. The point of view suffered a complete change. What was it that the *dominus proprietatis* wished to do, or could do, with the *res*? Primarily he was interested in preventing acts on the part of the possessor which impaired the residuum. The usufructuary, for example, had his privileges determined by the transaction that created the usufruct. He might not transgress them, and above all he might not deal with the corpus in such a way that it became useless when, and if, the usufruct terminated. Roughly speak-

<sup>13</sup> G. 4, 15; C. 7, 25, 1.

<sup>14</sup> D. 7, 1, 15, 6; 9, 4, 19, 1.

ing, he might not commit waste. A usufructuary, completely irresponsible for waste, was really a grantee.

The *dominus proprietatis*, accordingly, was thought of as a person who could prevent uses of the *res* beyond those actually vesting in the holder of the special right. It was as a group of these claims to forbearance that his "title" was commonly viewed. These claims could be enforced largely by existing actions of delict, the action on the *lex Aquilia* being the one most frequently employed, or the interdicts.

### ACTIONS TO TEST TITLE

125. Vindication lay originally for the Quiritary owner.

The bonitary owner had the Publician action, which allowed vindication by means of a fiction.

Owners of limited interests might protect them by the delictual actions of theft, by the interdicts, and by an action to have their interests declared, *actio confessoria*.

The *dominus* might bring an *actio negatoria*, to have such interests declared to be nonexistent.

The primary action for testing title was the vindication. This is one of the oldest forms of Roman procedure and is applied primarily to *res Mancipi*. It began with the assertion of a Quiritary title. It seems, however, soon to have been extended to *res nec Mancipi* as well. It was most decidedly an action in *rem*, since it was essentially the seizure of a *res* by a claimant and the simultaneous assertion of ownership.<sup>15</sup>

But if there was both a Quiritary and bonitary owner, as in the case of *res Mancipi* informally transferred, the vindication could not be used by the man who in equity and practice is the real *dominus*; i. e., the bonitary owner. To assist him, the Publician action of unknown date allowed the equivalent of vindication by means of a fiction. The bonitary owner, who

<sup>15</sup> C. 3, 32; D. 6, 1; G. 4, 5.

sought possession of his property, was permitted to plead that he had acquired a Quiritary title by prescription (*infra*, § 134), and thereby enabled to get it. Since the prescriptive period was originally very short, his claim soon ceased to be a fiction, and the Publician action would be unnecessary.<sup>16</sup>

As between the Quiritary and bonitary owners themselves, the latter could in this way regain possession, if by accident or fraud the Quiritary owner, after having informally transferred it, regained control over it. And if the Quiritary owner, after an informal transfer, attempted to bring a vindication against the transferee, he would be met with the exception *rei venditæ et traditæ*, the "defense that the *res* had been sold and delivered."<sup>17</sup>

Those who had no *dominium*, whether Quiritary or bonitary, could not vindicate, nor bring the Publician action. But they could often bring many of the delictual actions, which the *dominus* could bring as well, the *actio furti*, the action on the Aquilian law being the commonest. They might do so when they had no interest in the *res* at all. But, when they had such an interest, a usufruct, an easement, or the like, they were protected by special actions to protect their rights or to have them declared to exist *actio confessoria*.<sup>18</sup>

Similarly a *dominus*, who denied the existence of any other rights in the *res*, might by the *actio negatoria* have that fact established, an action plainly similar to our bills in equity to remove a cloud on a title.<sup>19</sup>

<sup>16</sup> I. 4, 6, 4; D. 6, 2; G. 4, 36.

<sup>17</sup> D. 21, 3.

<sup>18</sup> D. 8, 5, 2, 1-2.

<sup>19</sup> I. 4, 6, 2; D. 7, 6, 8, pr. 8, 4, 4, 2.

## CHAPTER 18

## ACQUISITION OF PROPERTY

## Section

- 126. Occupation or Seizure (*Occupatio*).
- 127. Specification.
- 128. Organic Products.
- 129. Accession.
- 130. Combination.

OCCUPATION OR SEIZURE (*OCCUPATIO*)

126. Things without owners, *res nullius*, became the property of those who seized them by "*occupatio*."

Animals *feræ naturæ*, enemy property, and treasure trove were the commonest examples of *res nullius*. In the case of the last thing, half belonged to the owner of the soil.

While the various groups and classes of property mentioned in the last chapter had little practical importance in the developed Roman system, there was a group of things of which this cannot be said. These were *res nullius*—"no one's property"—things which either never had, or had ceased to have, an owner. Of these there were several types, although not all were technically called *res nullius*.

(1) Animals *feræ naturæ*; i. e., birds, wild animals, and fishes in a state of nature.<sup>1</sup>

(2) New things, that came into existence by natural causes, such as an island created in the sea by volcanic action; pearls found on the seashore.<sup>2</sup>

(3) Property of an enemy (*hostis*). For this purpose, we

<sup>1</sup> I. 2, 1, 12; D. 41, 1, 1, 1.

<sup>2</sup> I. 2, 1, 22; 2, 1, 18; D. 1, 8, 3.

may define an enemy as any foreigner who had no rights of any kind that could be asserted in a Roman court.<sup>3</sup>

(4) Things abandoned by their owners (*res derelictæ*). This class, of course, does not include things mislaid or lost, but merely those things which the owner has deliberately abandoned, with the intention of giving up ownership. As in all cases, "intention" meant those external acts from which such intention may reasonably be inferred.<sup>4</sup>

(5) Treasure trove (*thesaurus*). These are things hidden or concealed in the earth, the original ownership of which can no longer be established.<sup>5</sup>

Title to all these things can be obtained by *occupatio*—occupation or seizure; but there are slight differences in the way in which occupation was effected.

In the case of animals *feræ naturæ*, occupation meant effective seizure, not the first wounding. Once taken, wild animals are property, like any other thing, and title is lost only by abandonment, or by the reversion of the animal to its wild habits. Deer captured and allowed to roam freely in a deer park are still the property of their captor. Birds and bees are *feræ naturæ*, as well as beasts, but the term never seems to have been applied as we apply it to gas and oil.<sup>6</sup>

Enemy property captured in actual war (*præda*) was really the property of the state, and became the property of the individual soldiers only after the general had, in accordance with his authority, distributed it to such soldiers. But enemy property on Roman soil, and booty taken in forays or raids, was the property of the taker by occupation.

In the case of abandoned property it was finally decided by

<sup>3</sup> G. 4, 16; I. 2, 1, 17; D. 41, 1, 5, 7.

<sup>4</sup> D. 41, 7, 1.

<sup>5</sup> I. 2, 1, 39; D. 41, 1, 31, 1.

<sup>6</sup> It has been freely applied to gas and oil in America. *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 130 Pa. 235, 18 A. 724, 5 L. R. A. 731; *Thorton's Law of Oil and Gas* (4th Ed. 1925) §§ 24, 25, 30.



Justinian, after considerable controversy between Proculians and Sabinians, that title was lost to the former owner on abandonment, and not merely when the finder took them into possession. This left them ownerless in the interim.<sup>7</sup>

As to treasure trove the acquisition of title is not called *occupatio*; but it is more like it than it is like anything else. The finder who actually took the treasure into his possession became the owner of half, but the other half became the property of the owner of the land, even if he knew nothing of the finding. If the land was the finder's, he got it all; but, if he had expressly searched for it on another's land, title to all of it vested in the owner.

In the case of treasure found on sacred or religious land, the finder became the owner of all of it, while, if the land was public, half went to the *fiscus* or imperial treasury.

There is trace of an older rule that title to all treasure was the prerogative of the state, a rule still in force in England, though generally waived in practice. But in later times at Rome there is only a very ill-defined right of forfeiture to the *fiscus* in some cases. Similarly there is nothing in Rome like the English crown rights to flotsam and jetsam.<sup>8</sup>

### SPECIFICATION

127. To change the form of materials was to create a new *species*. It belonged to the person who had created it.

If the materials had originally been another person's, an attempt was made to adjust the conflicting rights equitably.

Just as a new thing may come into existence by natural causes, such as an island in the sea, it may be artificially made by

<sup>7</sup> I. 2, 1, 46, 47.

<sup>8</sup> Buckland, Text-Book, pp. 220-221. Girard, Manuel, p. 331, note 11; D. 49, 14, 3, 10.

human handiwork. In that case it is, of course, always a change of materials by labor from one form into another. The creation of such a new form (*nova species*) is called specification. It is often a fine and even somewhat metaphysical question to determine the point at which a new form has come into existence. Again we meet the quarrels of the schools. The Proculians asserted that the creation of a *nova species* entitled the creator to ownership of it, without reference to the ownership of the materials out of which it was made. The Sabinians declared that, whether a new *species* existed or not, ownership of the materials was not changed by changing the form of the materials. Justinian claimed to be following a middle course. If the *nova species* could be reduced to its constituent materials, there was no change of title. If it could not, the new form belonged to the maker.<sup>9</sup>

The common example is the casting of a bronze statue. This may be a *nova species*; but, since the statue can be reduced by melting to bronze, the title remains in the owner of the bronze. Making oil from olives is similarly the creation of a *nova species*, but in this case the olives cannot be restored. Title, therefore, vests in the maker of the oil.

The matter is not of first-rate moment. More complicated situations arise when the materials belong partly to the owner and partly to another person. They will be discussed under the head of accession.

## ORGANIC PRODUCTS

128. The general rule is that title to the products go with title to the land.

However, a tenant or a usufructuary can get title to the crops by reducing them to possession, and an *emphyteuta* or *bona fide* possessor gets them as soon as separated from the soil.

<sup>9</sup> I. 2, 1, 25; D. 41, 1, 7, 7.

Crops grown on the soil, and fruit of trees, are two common types of organic products. As long as they form part of the land, there can be no question that the owner of the land is the owner of the product. But the chief purpose of causing the product to come into existence is to separate it from the land. On separation, a new thing undoubtedly comes into existence, and, under normal circumstances, the owner of the land will be the owner of the separated crop or fruit as well.<sup>10</sup>

But there are a number of cases in which the title to the crop on separation, or shortly after, vests in some one else than the owner:

(1) A tenant for a limited term (*conductor fundi-colonus*), who sows a farm, does not acquire the title to the crops until he has reduced them to possession (*perceptio*). It is not enough that they have been cut.<sup>11</sup>

(2) An *emphyteuta* (supra, § 89), having an interest in the land itself, acquires title to the crops he has sown, by separation—i. e., on reaping—whether he reduces them to possession or not.<sup>12</sup>

(3) A usufructuary, again—i. e., one who has what was called a personal servitude in the *res*—is like a tenant in respect to products. He acquires the property only by reducing the crop to possession. Accordingly, if the crops are reaped and carried off by a third person, the usufructuary could not prosecute the thief; nor vindicate the crops, since he never owned them or had them.<sup>13</sup>

(4) A *bona fide* possessor of land obtains title to the fruits by separation. If the crop is reaped and carried off by a thief, it is he and not the owner of the land who has a right of action against the thief. But in Justinian's time the law was somewhat modified. Suppose A. to be the *bona fide* possessor of

<sup>10</sup> I. 2, 1, 35; D. 7, 1, 59, 1.

<sup>11</sup> D. 47, 2, 62, 8.

<sup>12</sup> D. 22, 1, 25, 1.

<sup>13</sup> D. 7, 4, 13; I. 2, 1, 36.

land which belongs to B. A. plants corn, reaps, and stores it. B. then brings vindication. He will not merely recover the land, but all the grain which is still at hand and unconsumed. A. however, will not have to account for the grain he has actually used, since it was his property at the time of consumption.<sup>14</sup>

Very similar rules apply to the wool of sheep and the young of animals. In later law, the offspring of slaves was not classed as fruits, and always belonged to the owner of the mother.<sup>15</sup>

The rent of property—especially when, as was the case in many urban houses, the property was intended primarily to be rent-producing—and the interest on investments were generally treated as practically equivalent to *fructus*, although the later term, *fructus civiles* (rents and profits), is not used in the Roman sources.<sup>16</sup>

### ACCESSION

129. (a) The adding of small pieces of land to larger vests title in the owner of the larger (*alluvio*, *avulsio*).
- (b) The adding of movables to immovables, “fixtures,” regularly vested title to both in the owner of the immovable; but in separation, if separation is possible, title reverts as it was before.
- (c) Constructing of edifices was subject to special rules. Good faith was an important matter. The general rule forbids destruction of buildings, and leaves persons injured to delictual or quasi contractual remedies.

The action *de tigno iuncto*, as old as the XII Tables, allowed double damages, even if good faith was present.

<sup>14</sup> D. 7, 4, 13.

<sup>15</sup> D. 2, 1, 37; 5, 3, 27.

<sup>16</sup> D. 5, 3, 29.

The term "accession" generally means that something of small size, or value, or importance, has been made an integral part of a larger, or more valuable, or more important *res*.<sup>17</sup> We shall, however, consider, not only these cases, but those in which any two things are in some way combined or fused, whatever their relative importance.

(a) First of all, land can be added to land. The force of a stream carries off a piece of 'A.'s land and drives it upon B.'s. When it becomes firmly attached to it, the property in the portion so carried off vests in B. (*avulsio*).<sup>18</sup>

Again, gradual carrying of silt by a river can add considerable portions to land along its banks. There can be no doubt that the new land so created is the property of the land which it has increased (*alluvion*).<sup>19</sup>

A river bed runs dry in whole or in part. The land uncovered is the property of the riparian owners on both sides, the dividing line being a line drawn through the center of the old river bed.

(b) Secondly, articles of various kinds may be added to the land, "movables" to "immovables."<sup>20</sup>

At the common law, this involves the complicated and difficult question of "fixtures." The question was not nearly so important at Roman law, because the difference between real and personal property was less important; but the problems that arose were not without their difficulty.

The general rule was that the land (the immovable) was always the principal thing, and the other (the movable) the accessory. The latter therefore merged in the former, and the owner of the land became the owner of the accessory by the act of affixing.

That was emphatically the case when seeds were placed in the soil, or trees and shrubs planted. Suppose the seed or the

<sup>17</sup> D. 33, 8, 2; 21, 1, 31, 24.

<sup>18</sup> I. 2, 1, 21. The term *avulsio* does not occur in the sources.

<sup>19</sup> I. 2, 1, 20; D. 41, 1, 7, 1.

<sup>20</sup> D. 6, 1, 1, 1.



trees had been A.'s, and had been planted on B.'s land. They become B.'s as soon as they germinate or take root, and, even if they are afterward torn up, they do not revert to A.

If, instead of plants, there are edifices constructed on B.'s land, with A.'s materials, the rule is slightly modified. The rule of principal and accessory is maintained. B. becomes the owner of the edifice, because he was the owner of the land. But, if the structure should be demolished, the materials revert to their former ownership.<sup>21</sup>

The whole matter is complicated by a detailed discussion of the good or bad faith with which the affixing takes place. We may first consider the case of sowing or planting.

A., a bona fide possessor of B.'s land, plants trees on it. B. vindicates the land. A., by setting up the *exceptio doli*, can demand the payment of an indemnity as a condition of B.'s success. Doubtless the exception will lie only when the planting was a real enhancement in value of the estate.

If A. has deliberately, with full knowledge that the land was B.'s, planted trees on it, he loses title to the trees completely, and has no claim for indemnity. The case is treated as one of gift.<sup>22</sup>

Reversing the situation, we may suppose that B. has taken A.'s trees and planted them on his own land. If it was deliberately done, it is *furtum* (supra, § 45), and A. has all the remedies granted for *furtum*. But, even if B. is in good faith, A. may bring the *actio ad exhibendum* (supra, § 47), and, since B. cannot produce the *res*, A. may claim compensation. Indeed, he may bring an adapted vindication, *actio utilis in rem*, to recover the trees themselves, an action which would ordinarily sound in damages.

The question of the construction of buildings on the land of another is complicated by other considerations. An ancient provision of the XII Tables—which remained permanently in force—forbade the demolition of structures. If B. has

<sup>21</sup> I, 2, 1, 29; D. 41, 1, 7, 10.

<sup>22</sup> D. 19, 2, 19, 4; 19, 2, 55; I. 2, 1, 30–32.

built on his own land with A.'s materials, in good or in bad faith, A. can bring against him an ancient action, called *de tigno iuncto*, for double the value of the materials. When the structure is demolished, if A. has brought this action, he has no further claim against B., provided that B. was in good faith; but, if B. was in bad faith, A. may vindicate the materials, or sue in *furtum* for them.

If it is the owner of the materials (A.) who has used them on B.'s land, he cannot, of course, regain them by tearing the structure down, nor can he bring the action *de tigno iuncto*. But, if B. vindicates the land with its structures, A., as before, can set up a claim for indemnity in an exception of *dolus*.<sup>23</sup>

It is frequently stated that, whether A. is in good faith or not, he can take away as much of the building material as will not imperil the structure, and all of it when the building is demolished. The soundness of this interpretation of the texts is much doubted, and it is hard to reconcile this point of view with the general attitude toward those who act in bad faith.

### COMBINATION

130. When two movables are combined, if they are co-ordinate in importance, joint ownership results, subject to an action for partition, *communi dividundo*.

If one is principal and the other accessory, title vests in the owner of the principal *res*, subject to delictual remedies in the other owner in case of bad faith.

The test of principal and accessory was importance, rather than value. Sometimes, however, it was merely value.

<sup>23</sup> D. 47, 3.

Besides delictual remedies, special actions and adapted vindications lay to recover the value of the accessory *res*.

The third case is that of the combination of two movables. The various names for certain kinds of combination, confusion, mixture, etc., are of minor moment. But a distinction was made between cases in which the movables were of equal importance and those in which, as in the case of "fixtures," one was principal and the other accessory.

When both articles are of equal importance and can be readily separated, there is no change of title. The owner of either part can by vindication compel both the separation of his property and its restoration to him. And when the articles have lost their identity in a common mass, the owners of the amalgamated goods become owners in common. Either may enforce a partition by the *actio communi dividundo* (supra, § 97), which, in most cases, will involve a sale and the division of the proceeds.

Good or bad faith is not involved in this, since there is technically no loss of property at all; but for any injuries caused the guilty person is liable, if in no other way, in an *actio in factum*.

The most frequently cited example of a separable mixture is the welding of two pieces of metal. An inseparable mixture is generally illustrated by two liquids poured into the same receptacle.<sup>24</sup>

The case of mixture of grain is slightly different. Theoretically, the grains retain their identity; practically, they do not. Either owner may vindicate, but his claim will be satisfied, not by the exact kernels of which he is theoretically the owner, but by a proportionate share of the mixture.

A different result was reached in the case of money, which, we may remember, was always coined money. If A. took B.'s money, B.'s title was not changed, and he could follow the

<sup>24</sup> I. 2, 1, 27; D. 41, 1, 7, 8-10.

coins, like any other *res*, if he could identify them. In this respect, modern systems are completely opposed to the Roman, since title to money passes even to a thief. But, if A. mixes B.'s coins with his own, A. gains, even at Roman law, a complete title to the whole amount, and B. has merely the civil and criminal remedies for *furtum*.<sup>25</sup>

In many instances, however, it was assumed that one article was principal and one was accessory. The discrimination was one of common sense, rather than based on fixed principles. Plainly a chariot was the principal thing, when a wheel was affixed to it; a table was principal, and a leg was accessory, and so on. The basis was not always relative value. A ring was the principal thing, and a diamond set in it the accessory, in spite of the greater value of the latter. The parchment on which a book was written was the principal, and the writing on it, even if the letters were gold—was accessory.

But in one case value became the test. When paintings were made on wood—as was often done—it was the wood which was the accessory, and the painting the principal thing.<sup>26</sup>

In all instances of principal and accessory things, the title to the whole was in the owner of the principal one. Consequently, if the owner of the accessory had deliberately made the combination, he was deemed to have made a gift of his property. If the owner of the principal *res* had deliberately combined the accessory with his property, he was guilty of theft (*furtum*).

The distinction noted in the case of mixtures and of buildings applies here. B. has set A.'s diamond in his own (B.'s) ring, or put A.'s wheel to his own cart. Later the stone or the wheel is removed. Title to the wheel or diamond reverts to A., without regard to B.'s bad faith or good faith, which means his knowledge or ignorance that the accessory was A.'s. Bad faith, however, on B.'s part, made at least this much difference: That A. could compel a separation by an *actio ad*

<sup>25</sup> D. 6, 1, 23, 5.

<sup>26</sup> I. 2, 1, 33, 34.

*exhibendum*, while in all probability he could not do so if B. had acted *bona fide*. In that case A. could merely sue in an *actio in factum* for the loss he had suffered, and, of course, he could bring no delictual action.

In those instances in which the accessory could not be separated from the principal *res*, the same rules applied, except that there was now no possibility of A.'s ultimately recovering his property. As an instance we may cite the case of B. dyeing his cloth with A.'s dyes. Only in one exceptional instance, the painting by B. of a picture on A.'s tablet, was there an exceptional remedy. A., who lost his tablet, might bring an adapted vindication—*actio utilis in rem*—which would permit him to recover the actual value of his property, and not merely the loss measured by equitable standards.



## CHAPTER 19

## DERIVATIVE ACQUISITION OF PROPERTY

## Section

- 131. Transfer of Title with Consent of Transferor—Mancipation.
- 132. *In Iure Cessio*.
- 133. Delivery (*Traditio*).
- 134. Usucapion.
- 135. Good Faith and *Iustus Titulus*.
- 136. Continuity of Possession.
- 137. Limitation of Actions.

TRANSFER OF TITLE WITH CONSENT OF  
TRANSFEROR—MANCIPATION

131. Transfer of property ended the *dominium* of one owner and substituted that of a new owner.

The term “singular succession,” used by civilians, describes the process.

*Res Mancipi*, at the old law, could be transferred only by the ritual of mancipation, with the bronze scales, official balance holder, and five witnesses (*æs et libra*). Delivery was not necessary.

We have examined in the previous chapter cases in which B. became the owner of property which had never belonged to any one else, or was ownerless at the time of B.’s acquisition. That is true, even in the cases of accession, for the article, consisting of combined principal and accessory *res*, is a new thing, which never had existence before, and could, therefore, have had no previous owner. In this chapter we shall consider those cases in which B. succeeded a previous owner.

Such succession could be effected with B.’s consent, as in the case of mancipation, *in iure cessio* (“suffering a recovery”), delivery, and testamentary or intestate succession. The latter, however, is so important a topic that it is always treated separately.

But it was also possible that B. might acquire a title which was formerly A.'s, without A.'s consent. This was generally accomplished by prescription or *usucapion*.

The general name for the case in which B. succeeds A. in his rights in respect of a *res* is transfer, which in the later civilians was sometimes called "singular succession." The term "transfer" is an obvious metaphor, but it is so common that we often forget that it is a figurative expression, and draw inferences from the picture it conjures up which the law does not justify.

The *dominus* did not merely have privileges in regard to his property, the rights of use and consumption (*ius utendi, fruendi, abutendi*, supra, § 123), and claims concerning it, e. g., right to damages for trespass, or detention, or injury to his property, right to vindicate it, etc., but he also had legal powers concerning it. He had the capacity of abandoning all his privileges and claims, of abandoning some and retaining some, and of creating privileges and claims to the *res* in other persons. It is this last act, the creation of privileges and claims in other persons, generally coupled with the destruction of the same claims, or some very like them, in the former *dominus*, which we call a transfer. It will be readily seen that the civilian idea of making it a type of succession is a better description of what really takes place. But, whether "transfer" is a figure of speech or not, it is a very old one, and it dominated both expert and lay imagination. The easiest way to conceive of a person becoming *dominus* was to fancy the various groups of rights and powers inherent in the term, as though they formed a concrete object, which was capable of being physically carried from the grantor's hand to the grantee.

How was the transfer effected? Mention has already been made of the ritual of mancipation (supra, § 121), which was the oldest and most characteristic method, and must be fully described. If A. wished to transfer a slave to B., both parties met in some public place, together with an official balance holder (*libripens*) holding a scale made of bronze, and five witnesses, who must be adult citizens. B. then put one hand on the slave

and took a piece of bronze in the other, and uttered the words, *Hunc ego hominem ex iure Quiritium meum esse aio isque mihi emptus esto hoc ære æneaque libra*, "I declare that this man is mine in accordance with the law of Romans; and let him be considered as purchased by me by this piece of bronze and this bronze scale." Thereupon he struck the scale with the metal and handed it to A.<sup>1</sup>

If the *res* was a movable, it had to be present, and only so many movables could be sold by a single act of mancipation as B. could actually touch at the same time. Land, however, could be sold to any amount, even if it was at a distance. Evidently all that was necessary was to name or describe the property.

The piece of bronze was a symbolic price. Evidently there had been a time when it was the actual price—when the Romans used unminted bronze as money. The tradition ran that the Decemvirs, who drew up the XII Tables, also introduced coined money, and so made the piece of bronze of the mancipation merely fictitious.

The effect of mancipation was to transfer title at once from A. to B. No delivery of the *res* was necessary. It has already taken place in the case of movables, and was apparently unnecessary in the case of immovables. Mancipation applied only to *res Mancipi* (supra, § 121); but, as these were at all times the largest part of a Roman's wealth, it continued to be used, long after it was necessary, and seems not to have died out completely until just before Justinian.

An especially striking illustration of the fact that derivative acquisition is rather a rearrangement of rights and privileges than a "transfer" may be found in the fact that the mancipator could "deduct an easement," or several easements, so that B. got only most, and not all, the rights of A., just as, if A. mancipated the easement alone, B. would acquire only a very small part of what A. had.<sup>2</sup>

<sup>1</sup> G. 1, 119–122.

<sup>2</sup> D. 7, 1, 46, pr.

Since mancipation takes effect by the ritual, or not at all, there would be no condition attached to the sale, and no postponement of operation. This was a very important characteristic, and was much insisted on.<sup>3</sup>

### SAME—*IN IURE CESSIO*

132. *In iure cessio* was an undefended suit in which title was claimed. It was used for transfer of an intangible *res*. In many respects it resembled "suffering a recovery" at common law.

In form this was a collusive suit. B. brought an action of vindication against A., claiming a specific *res*. A. appeared, but did not defend; i. e., did not assert the counterclaim which was the essential part of the *legis actio sacramento* (supra, § 12). The thing would therefore at once be adjudged to B.<sup>4</sup>

The similarity of this type of acquisition to suffering a recovery at the common law is apparent. The purpose, however, was somewhat different. Recoveries were suffered at the common law principally to evade the provisions of certain statutes or legal rules; e. g. to bar an entail, or to escape the penalties of mortmain. At Roman law a *cessio in iure* was principally used because it was a more unmistakable way of effecting a transfer of an intangible *res*, such as servitudes or easements, which, we may remember, were *res mancipi*. The form was also very popular for adoptions and emancipations (supra, § 38), and for this purpose was not abolished until the time of Justinian.<sup>5</sup>

<sup>3</sup> D. 50, 17, 77.

<sup>4</sup> G. 2, 24-37.

<sup>5</sup> C. 8, 47, 11.

SAME—DELIVERY (*TRADITIO*)

133. Delivery is the common method of transferring title in later law. It did not need an actual manual transfer, and in two cases—(a) when the transferee was already in possession, *traditio brevi manu*; and (b) when the transferor wished to hold it as tenant or bailee, *constitutum possessorium*—agreement was enough.

Two requirements were essential: (a) *Iusta causa*, i. e., a situation which would normally result in transfer of title; and (b) title in the transferor. The cases in which a nonowner may confer ownership are very few at Roman Law.

The assertion that there was a third requirement, payment or security for the price, is not borne out by the texts.

Mancipation and *in iure cessio* are complicated methods. A much simpler way of making B. the owner of what A. formerly had might seem to be the delivery of the property by A. to B. Yet it is undoubtedly true that, in Roman law, at any rate, it is the more advanced and less primitive way of effecting a change in ownership, and the formal and ritual methods existed side by side with it.

*Traditio*—i. e., delivery—was an institution of the *ius gentium*, not primarily because the surrounding nations had no formal methods, but because it was a matter of common knowledge and common sense that the ultimate purpose of a change in ownership was to give the new owner control of his property.

Just what was necessary for *traditio*? It was not always manual delivery, and it could not be manual delivery in the case of land. It was enough if the deliverer (*tradens*) pointed the thing out to the new owner and bade him take it, providing there was nothing to prevent the latter from doing so. If he gave him the key to a box or warehouse, that was not a symbolic de-



livery, like the livery of seisin of the common law, but simply the granting of the means of getting the *res*.<sup>6</sup>

There were a few cases in which there was no delivery because there was no need for it, since the *res* was already in the possession of the new owner. A., let us suppose, has lent or leased property to B., and now wishes to make a gift of it to B., or sell it to him. As soon as the gift or sale is made, title passes, since the goods are already delivered. This kind of delivery received the name of *traditio brevi manu*, "shorthand delivery."<sup>7</sup>

The reverse of this situation equally transfers title without an actual delivery. A., the owner in possession of the thing, wishes to grant it to B., but to continue to hold it as B.'s tenant or B.'s commodatary. It would be idle to put the *res* in B.'s possession, only to have possession at once resumed by A. The agreement itself will be sufficient to change the relation of A. and B. This agreement was called *constitutum possessorium*.<sup>8</sup>

The difficulty with delivery is that it is ambiguous. If A. turns over to B. the effective control of a *res*, it may be a gift, a sale, a *commodatum*, a deposit, a lease, or the granting of a usufruct. In the first two cases, the delivery will give B. title; in the others, it will not. How are these cases to be discriminated? It is stated by Paul that a *iusta causa*, "a legal basis," must precede the delivery in order to enable it to transfer title. The acts or words of the parties, which were followed by delivery, must be such as to indicate an intention to make a sale or a gift.<sup>9</sup>

But it was quite possible that the acts or words were themselves ambiguous, and might be interpreted differently by different people, and were, as a matter of fact, interpreted differently by the parties. Suppose A. gave B. some money, intending it as a gift; but A. understood it to be a loan. There is a famous contradiction in the Digest on this matter. Julian held

<sup>6</sup> I. 2, 1, 40; D. 41, 1, 9, 3.

<sup>7</sup> I. 2, 1, 44; D. 41, 1, 9, 5.

<sup>8</sup> D. 41, 2, 18, pr.

<sup>9</sup> D. 41, 1, 31.

that the title to the money passed; Ulpian, that it did not. It seems hard to justify Ulpian's decision, since, whether the *causa* was loan or gift, title would pass in the case of fungible goods like money (cf. *supra*, § 61). And it is apparent that Julian's decision prevailed, and that the contrary view of Ulpian, hidden in a qualifying clause, was retained by the sort of inadvertence which even the most careful compilations will show. But, if the doubt had been whether the situation was one of *commodatum* or gift, I think there can hardly be any doubt that title would not pass, if the ambiguity arose from the situation itself.<sup>10</sup>

But there was another condition necessary to make delivery, *traditio*, a vehicle for conveying title. The deliverer must himself be *dominus*. The power to convey a title by one who does not have it is familiar to modern European and American law. It is the special characteristic of the process of negotiation in mercantile law, in which it frequently happens that one who has no title at all, a thief or a finder, has the power to create a good title in another person, who takes from him. For this it is merely required that the transferee shall be in good faith and have parted with value. In France and Germany, the old Germanic principle that *bona fide* purchasers of movables were in general preferred, has found expression in the Codes, in the famous *possession vaut titre*, "possession is as good as title," of the French Code Civil (section 2279) and section 932 of the German *Bürgerliches Gesetzbuch*.<sup>11</sup> The common law knows the principle in the rules of market overt, and, since the Statute of Elizabeth, in the laws governing retention of possession by a vendor. At Rome, such a power was apparently granted only to the sovereign during the Empire. A sale by the *fiscus*, or a

<sup>10</sup> D. 12, 1, 18, pr.

<sup>11</sup> Saleilles, R., *De la possession des meubles*, Planiol, *Traité Él. de Droit Civil*, I, §§ 2459-2473. The ancient German rule was *Hand wahre Hand*, F. Kretzschmar, *Recht des Bürgerlichen Gesetzbuches*, *Sachenrecht*, I, § 38.

private conveyance of the Emperor or the Empress, passed title, without regard to claims of third parties or previous holders.

Except for this last circumstance—almost inevitable in a state organized like the Roman Empire—the Roman held rigidly to the doctrine that a man could not give what he did not have.<sup>12</sup> The process of negotiation was quite unknown. That the owner of property could be ousted by theft or accidental loss, even in favor of *bona fide* purchasers, would have appeared appalling, and even in the less striking cases of retention of possession there would seem no reason to prefer a *bona fide* purchaser to the original owner. Whether this result is due to a stressing of the figure of speech implied in the word “transfer,” or to a different commercial psychology developed under the two systems, we need not inquire.

Even *traditio*, even a *iusta causa*, it is said, will not always transfer title in the case of sale.

Justinian makes a statement that seems to say just this; but there are other passages which distinctly imply that tradition alone was enough. A very extended discussion has been conducted about this matter. I do not think that the seeming discrepancy justifies the important inferences that have been drawn from the passages. Justinian (Institutes, 2, 1, 41) and Pomponius (Digest, 18, 1, 19) say that title will not pass unless the price has been paid, or credit given with or without security. Now it is obvious that every sale is either a sale for cash or credit, so that Justinian and Pomponius are stating no more than the rule of common sense and ordinary experience, to wit, that, in the absence of an understanding to the contrary, delivery and payment are mutually concurrent conditions.

What both have in mind is the situation in which a sale intended to be a cash sale, and in which possession of the *res* has been gained by the buyer, either in good or in bad faith, without payment. The seller may have handed the goods over for inspection, for temporary detention, or in some other way it may

<sup>12</sup> D. 41, 1, 20, pr.

have been indicated that the surrender of control is not meant to transfer title, or else, in a cash sale, he may have turned over the *res* in the expectation of simultaneous payment, and payment may have been refused. Such transfers of the goods do not pass title, and the assertion that they do not scarcely qualifies the rule that title is regularly passed by delivery. The passages quoted certainly do not put the contract of sale in a special class in this respect.<sup>13</sup>

It is evident that the absence of witnesses made frauds possible, which mancipation prevented. A constitution of Constantine, which was not taken into the Code of Justinian, reintroduced witnesses by requiring the presence of neighbors in every sale. In the case of gifts, formal requirements were frequently set in imperial legislation. We may assume that the *iusta causa* of gift or sale was often embodied in a stipulation, and that the stipulation was often evidenced by a memorandum or *cautio* (supra, § 114). It may well have been that the insistence on written forms in the Eastern part of the empire made it a common practice everywhere to supply by some sort of documents the security which the presence of witnesses created in the older forms of conveyance.

## USUCAPION

134. At the older Roman Law, the possessor of land or of movables, who did not have title, would obtain it after the lapse of a very short time—two years for immovables; one year for movables. Acquisition by this method was called usucapion, and it applied only to *res mancipi*. The need of validating defective titles and the absence of a recordation were the chief reasons for the shortness of the period.

<sup>13</sup> Buckland, Text-Book, p. 231.

In imperial times, the period of ten years was established for cases not covered by usucapion. The term prescription was applied to this method of acquisition.

Justinian merged the two. The periods were now three years for movables, and ten or twenty years for immovables. A thirty-year period cured most defects of title.

In every system of law it soon becomes evident that it is impracticable to insist on a complete history of a title to either real or personal property. There is a sort of presumption—not necessarily a presumption in a legal sense—that, if B. is in possession of lands or chattels, he is the *dominus*. Against this must be weighed the obvious injustice of depriving a man of property which he may have lost by theft, or fraud, or accident, because he failed immediately to reclaim it. It is therefore quite general to set a limit within which such reclamation must be made, or forever forfeited. In this way a title could be proved by giving its history for a limited time, instead of for an indefinitely long time.

In the older period, that limit at Rome was very brief indeed—one year for movables and two years for immovables.<sup>14</sup> Acquisition of title by possession for this length of time was called technically *usucapio*, a word commonly Anglicized as usucapion. This was quite within the range of neighbors' memory. In fact, since there were no public records, a much longer time would have been impracticable. That there were other causes at work, which created both the institution of ownership by continued possession and the special period fixed for it, we may be quite sure, and apparently one of the causes was the desire of validating a title when there had been some formal defect or omission in the ritual of mancipation. That is to say, "bonitary" ownership would in a very brief time be changed to Quiritary owner-

<sup>14</sup> D. 41, 3, 3; Ulpian, Reg. 19, 8; Cicero, Topica, 4, 23.



ship (supra, § 123), and the special interference of the prætor to protect the equitable owner would be rendered unnecessary.

But there can be no doubt that one of the obvious advantages which usucapion possessed was to free the owner from excessive litigation in respect to his title. Few fraudulent claimants would venture to claim, against public knowledge to the contrary, that they had been owners within one or two years, and older claims were barred.

The motives which created brief periods of limitation in some common-law jurisdictions, even under a complete recording system, do not seem to have played much of a part at Rome.<sup>15</sup> In many Western states of the United States it has been found desirable to encourage the cultivation of land and the active use of other property, by giving ownership after a few years to those who were prepared to use the property actively as against a negligent owner at law. But neither here nor at Rome was active user, in the sense of exploitation, a requisite. Mere possession was sufficient.

Usucapion applied only to *res Mancipi* and to Roman citizens. Foreigners, who were residents, or, who had treaty rights—*peregrini*, as distinguished from *hostes* (supra, § 38)—would have to rely solely on the protection of their purely equitable rights by a prætor. It was a more serious matter that Roman citizens were in no better position as regards *res nec Mancipi* and especially as to provincial land. It is not until well on in imperial times, by special constitution, that an institution analogous to usucapion was created for such cases. A person who has been in peaceable possession of provincial land for ten years might, if his title was attacked, set up this peaceable possession as a defense.<sup>16</sup> To facilitate procedure, the question of ten years' possession was pleaded as a *præscriptio* (prescription), instead of as an exception (supra, § 20); that is, it appeared in the *formula*, even before the nomination of the *iudex*. The *præscriptio*

<sup>15</sup> G. 2, 43; D. 41, 3, 1.

<sup>16</sup> Bruns, Fontes (7th Ed.) §§ 87, 192.

*longi temporis* soon became the commonest of the prescriptions, and the term "prescription" itself became the practical equivalent of usucapion.<sup>17</sup> It is interesting to note that, when the term was taken over in the Middle Ages by English lawyers, it was falsely etymologized, and created the fiction of a, "lost grant," since the word *præ-scriptio* seems to mean, literally, an antecedent writing.

There was an important difference between usucapion and prescription. Not only was the period much longer in the latter case—ten years ordinarily, and twenty years when the parties were not domiciled in the same province—but the effect was not quite the same. Usucapion created a title that was every bit as good as that created by mancipation. When the time had passed, the usucaptor could say, "This thing is mine in accordance with the law of Romans," just as well as any one else. But prescription merely barred a remedy. It did not give a title which could be used offensively, as well as defensively. To assist a prescriptive owner in regaining possession was still a matter for the equitable interference of a magistrate.

The abolition of any distinction between *res Mancipi* and *nec Mancipi* by Justinian required a revision of the rules of usucapion and prescription. Justinian settled the matter by a constitution to the following effect:

(1) In the case of movables, the period was three years. For this, the name usucapion was retained.

(2) In the case of land, whether Italian or provincial, the period was ten years, if both parties were domiciled in the same province, and twenty, if they were not. It is to be remembered that the imperial provinces were very small. To this type of acquisition the term prescription was applied.<sup>18</sup>

Both prescription and usucapion, in the new system, created titles, and did not merely bar remedies.

<sup>17</sup> It may be that this particular prescription did not come into existence until "prescription" and "exception" were practically identical.

<sup>18</sup> I. 2, 5, pr.; C. 7, 31, 1.

Besides this, another innovation of Justinian was the creation of a new kind of prescription, the *præscriptio longissimi temporis*, in which the period was thirty years. This dispensed with some, at least, of the requisites of other forms of prescription—requisites which must be examined now.<sup>19</sup>

### SAME—GOOD FAITH AND *IUSTUS TITULUS*

135. There were two requisites necessary to enable prescription to confer a title: (a) Good faith, the possessor must believe himself to be owner; and (b) *iustus titulus*, he must have acquired it in some way that would ordinarily confer ownership.

There was the further requisite that the thing must not be affected with any vice. Above all, it must not be stolen property—*res furtiva*.

It was fundamental in the case of Roman usucapion and prescription that the acquirer must show good faith and *iustus titulus*. To establish good faith, he must show that he had every reason to believe that the ownership of the property was actually in him.<sup>20</sup> To establish *iustus titulus*, he must show that he had obtained the property by one of the legally established methods of getting an original or acquired title; e. g., purchase, gift, legacy, finding an apparently abandoned thing, etc.<sup>21</sup>

It was equally fundamental that the *res* be capable of prescription. Things that were *extra patrimonium* (supra, § 122) were incapable of it. Things that belonged to the state or the *fiscus*, and, later, things which belonged to churches or charitable foundations (*piæ causæ*), were equally incapable of it.

But the largest class of things incapable of being acquired by prescription were *res furtivæ*, things of which the owner had

<sup>19</sup> U. 119, 7.

<sup>20</sup> I. 2, 6, pr.; G. 2, 43, 93.

<sup>21</sup> I. 2, 6, 11; D. 41, 3, 27.

been deprived by *furtum*, a delict much more extensive than theft or conversion.<sup>22</sup>

With these three fundamental requisites, it is evident that the Roman scope of prescriptive acquisition is more restricted than that of the common law, or under the French Code. At the common law, good faith, *iustus titulus*, and a *res* capable of prescription are disregarded. Indeed, with the encouragement given to squatters, bad faith may be said to be essential, rather than good faith. The possession necessary to create title must be "open, notorious, and adverse." The requisite of "color of title" does not always obtain, and does not mean quite the same thing as *iustus titulus*.<sup>23</sup>

With the exclusion of *res furtivæ*, in the Roman sense of *furtum*, it is at first sight hard to understand what things could be acquired by prescription, except things regularly acquired by delivery without mancipation. But there was an element which put a great many things, which were actually *res furtivæ*, in the class of things capable of being acquired by prescription. If A.'s property has been stolen by X., it is of course a *res furtivæ*, no matter who has it, and A.'s title is never lost. But the *res* is "purged of its vice," ceases to be *res furtivæ*, not only when A. reacquires it, but as soon as he is in such a position that he can reacquire it; i. e., when he learns of its whereabouts.

The prescription *longissimi temporis*, created by Justinian, dispensed with *iustus titulus*, though not with good faith, and was applicable to *res furtivæ*. With a slightly longer period, forty years, it applied even to church property; it was, however, not applicable to things taken from the owner by force.

<sup>22</sup> D. 41, 3, 4, 6; 41, 3, 49.

<sup>23</sup> 2 C. J. 168 et seq.; Wright v. Mattison, 18 How. 50, 15 L. Ed. 280.

## SAME—CONTINUITY OF POSSESSION

136. In order to establish prescription or usucapion, the actual possession must be uninterrupted, but good faith was required only for the inception of the possession.

“Tacking” of periods (*accessio possessionis*) was at first prohibited, but finally permitted.

In order to establish prescription, the possession must be continuous. Loss of possession, even for a day, was fatal, and the period would have to be estimated all over again, when possession was recovered.<sup>24</sup> In this case, however, possession means legal possession, a point to which we shall have to recur. If B. has a *res* and leases it, or lends it, his possession is not interrupted, although as a matter of fact the thing is put in the hands of another person, because the tenant or borrower gets no possession (supra, §§ 65, 86, and infra, § 142). Nor does B. lose possession by pledging the *res*, even though the pledgee can prevent his retaking it, and has a sort of possession himself. But if it is stolen from B., or accidentally lost, his possession for the purpose of usucapion is ended.<sup>25</sup>

Although possession must be continuous, good faith need not be. If B. buys and pays for an article which is not *res furtiva*, but was sold by a nonowner, B. is in good faith and has a *iustus titulus*. He will therefore at the end of the fixed period become the owner, even though shortly after he obtained it he discovers a defect in the title of his vendor. But if he loses it for the briefest time after he has discovered the defect, and recovers it afterwards, he cannot acquire title at all, since the inception of his new possession is not in good faith.<sup>26</sup>

The Romans had originally the same difficulty in “tacking

<sup>24</sup> D. 41, 3, 2; 41, 3, 5; 41, 3, 6.

<sup>25</sup> D. 41, 3, 16.

<sup>26</sup> C. 7, 31, 1, 3; 7, 31, 2.



possession," *accessio possessionis*, that the common law had. If A. possessed an estate for one year, and sold it to B., who possessed it for a similar time, B. could not claim a two-year possession, and therefore no title by usucapion. When prescription (supra, § 134) was established, "tacking" was permitted, and by Justinian's rule was allowed both for usucapion and prescription.<sup>27</sup>

There was one situation in which tacking had always been permitted. If A. had been a possessor in good faith and with *iustus titulus* for one year, and then died, B., his heir, might count that year in determining the time necessary for giving him a title by usucapion. If, on the contrary, A. had been in bad faith, the year did not count, even if B. had been in good faith.

Prescription, and later usucapion as well, did not run against those under special disabilities. A Roman citizen, captured by the enemy, might on returning reclaim his property by *postliminium* (supra, § 39). The period of prescription did not run against him until he returned. It did not run against a minor, nor against any person who left his domicile on public business.<sup>28</sup>

### LIMITATION OF ACTIONS

137. Originally there was no statute of limitations for civil suits. Brief periods were introduced by the prætor for specific actions. Finally, a thirty-year limitation was provided for all others.

Although we are dealing with usucapion and prescription as a means of acquiring title to property, it seems fitting to refer briefly to the more general idea of prescription, as it applied to other actions besides an action *in rem*. Statutes of limitation are strictly statutes of prescription, in the older Roman sense of the term. They bar actions which, except for lapse of time, might properly be brought.

<sup>27</sup> D. 44, 3.

<sup>28</sup> D. 41, 3, 15, pr.

The old Roman civil law (*ius civile*) knew no statute of limitations. A right of action once acquired apparently lasted forever, unless the claim was in some way satisfied.<sup>29</sup> Many of the prætorian actions, on the other hand, the actions created by the *ius honorarium*, were subject to a very brief limitation. They were barred in one year. This applied particularly to delict actions, except the *actio furti*.<sup>30</sup> In a number of cases we have seen a time limit imposed as one of the essential characteristics of the obligation itself, as in the case of the redhibitory action in sales (supra, § 83). These limitations were in general maintained, and new special situations, with special periods of limitation, were created from time to time. But in the final form of the Roman law all actions, personal or real, were barred by the limitation of thirty years. Even then, it will be noted, an actual wrongdoer, a person guilty of fraud or theft, could not plead the defense of prescription.

This thirty-year limitation is still the common and general one of the civil-law countries, even those under modern Codes. A great many claims—especially mercantile ones—have a brief period of limitation; but, unless a special limitation is set for them by statute, they fall under the thirty-year period.<sup>31</sup>

<sup>29</sup> Buckland, Text-Book, p. 683; Poste's Gaius (4th Ed.) p. 546.

<sup>30</sup> D. 44, 7, 35; G. 4, 11B-113.

<sup>31</sup> French Code Civil, §§ 2262-2281, German B. G. B. §§ 194-225. In the Swiss Code, Ob. R. §§ 127-142, the general period is reduced to ten years.

## CHAPTER 20

## SERVITUDES

## Section

- 138. Servitudes in General.
- 139. Prædial Servitudes—Kinds.
- 140. Creation and Termination.
- 141. Personal Servitudes.
- 141a. *Damnum Infectum* and *Opus Novum*.

## SERVITUDES IN GENERAL

138. The servitude was a complex of rights in respect of a *res*, detached from the title and conferred on some one beside the owner. Their special importance is due to their history.

Any number or kind of servitude might be created. They were distinguished as prædial (appurtenant) and personal (in gross). The former applied only to land; the latter, to either land or chattels.

The transfer of *dominium* was, we have said, a succession. A., the former *dominus*, with his complex of privileges, powers, and negative claims in respect of a *res*, is succeeded by B., the new *dominus*, who has almost precisely the same group of privileges, powers, and claims. But it is obvious that A. need allow B. to succeed only to some of them. Some may be left in the hands of A. They may be so few as to be a mere "naked title," with all the substantial rights of present enjoyment gone. Or they may comprise all but one limited privilege, which has been conferred on B. This power of separating the *dominium* unit into its component parts, and making a separate transfer of the components, is a power essentially like the general power of transfer.

A number of cases in which the owner of a *res* has for a limited time surrendered the control to others have already

been considered. The *commodatum*, the deposit, the *pignus*, are all cases of this sort. Another case was that of lease, *locatio rei*. To distinguish them from the transactions that are called servitudes in Roman law, and easements or profits at the common law, is not altogether easy. The latter, however, seem at first glance to be a very different type of thing, because of the fact that we have always treated them apart from these former transactions and in respect of a wholly different class of things.<sup>1</sup>

Both in Roman and English law it was in connection with land that the servitude or easement chiefly developed. The privilege of passing or driving or riding over one's neighbor's land, of drawing water from it, of watering stock in it, is often practically essential in the effective use of one's own land. The neighborliness of friends and kinsmen may have supplied it originally, until in the growth of the community greater security was needed. The number of these servitudes was really unlimited. Any group of privileges might be conferred on a neighbor, or in his behalf any privilege might be surrendered, and the privileges could be as various as the uses to which land—or that particular piece of land—could be put.

But, while it was theoretically possible that any kind of servitude could be created, and any limitation in character placed upon each servitude, there soon developed certain definite groups of these rights and certain definite customary rules in connection with them. There is nothing inherently necessary in these rules. They merely represent the course which this institution happened to take in the special circumstances of Roman history.

Servitudes are first of all classified into *prædial* and *personal*, terms which are fairly well represented by the terms "appurtenant" and "in gross" of the common law. A *prædial* servitude was such a relation between the neighboring estates, Blackacre and Whiteacre, that the owner of Blackacre was

<sup>1</sup>I. 2, 3; D. 8, 1; C. 3, 34.

bound to let the owner of Whiteacre make a limited use of the other estate. By a natural figure of speech, Whiteacre was called the "master estate" and Blackacre the "slave estate"—dominant and servient tenement. The word "servitude" was properly applied only to these relations between estates in land, and was only later extended to cover rights in the personal property of another, and rights which adhered to a man personally rather than to an estate.

Personal servitudes, on the other hand, whether they related to land or chattels, had no idea of dominant and servient ownership. They attached to a man personally wherever he happened to be, and in practice involved a type of user which really excluded the legal owner altogether. The best example of a personal servitude is the usufruct, of which we shall have to speak later.

### PRÆDIAL SERVITUDES—KINDS

139. Prædial servitudes were rustic or urban, a distinction based on character of use rather than situs of the land. Some of the rustic servitudes would be classed as profits in the common law.

Common rustic servitudes were: (1) *Iter*; (2) *actus*; (3) *via*; (4) *aquæductus*; (5) *aquæ haustus*. Common urban servitudes were: (1) *Tigni immittendi*; (2) *stillicidii recipiendi*; and (3) *altius non tollendi*.

Certain rules were generally applied: (1) A servitude cannot impose active duties on the owner of the servient tenement. (2) It cannot impose burdens which are of no advantage to the dominant tenement. (3) No man can have a servitude on his own property. (4) Servitudes are indivisible.

These are again divided into rustic and urban. The distinction does not relate to the location of the land with which they are connected, but the character of the use which the



dominant tenement can demand of the servient. Rustic servitudes were those which dealt with the use of the surface of the land, or beneath it. Urban servitudes were those which were concerned with anything above the surface. But the distinction is not uniformly made, and it would be better to distinguish the two classes by the most common examples of each.

The oldest and most important of the *rustic servitudes* were rights of way. These were already known and regulated in some detail in the XII Tables. They were: (1) *Iter*, the right of going on foot over the servient land; (2) *actus*, the right of driving beasts across it; (3) *via*, a general right of passage; and (4) *aquæductus*, the right of leading a stream of water over it. *Via* implied both *iter* and *actus*, since it meant the right to have an unobstructed and prepared roadway over the land.<sup>2</sup>

Some of the rustic servitudes of later origin were drawing water on the servient land; pasturing cattle; burning lime; digging sand; watering cattle; throwing stones from a quarry; gathering fruit, and many others.<sup>3</sup>

Of the urban servitudes, the most frequently mentioned are: (1) *Tigni immittendi*, having a beam of your house supported by your neighbor's building; (2) *stillicidii recipiendi*, allowing your raindrip to fall on your neighbor's land; (3) *altius non tollendi*, prohibiting buildings on your neighbor's land that cut off your light or view. These are very far from exhausting the list of urban servitudes, but they are common illustrations, and perhaps the most generally in force.<sup>4</sup>

Servitudes in every way resembling these are recognized at the common law. Most of them would be called easements. That is particularly true of the older rustic servitudes and the urban ones mentioned. But some of the rustic servitudes—the right of digging sand, burning lime, quarrying stone or chalk—would be classified as profits or commons, rather than

<sup>2</sup> I. 2, 3, p4; D. 8, 3.

<sup>3</sup> D. 8, 3, 1, 1; 8, 3, 9.

<sup>4</sup> D. 8, 2, 1; 8, 2, 2.

easements. It is to be noted that, at the common law, all profits and a great many easements might be "in gross"; i. e., personal to a particular man, and not for the benefit of any particular piece of property. That is true, even for a right of way. At Roman law, on the other hand, all prædial servitudes, whether urban or rustic, were strictly "appurtenant"; they could be asserted only in favor of one estate as against another one.

While, in theory, there seems to be no reason why there could not have been any limitation of time and place whatsoever upon Roman servitudes, certain special rules grew up in connection with them. A servitude must be perpetual; that is, it could not be for a limited time, as a month, or a year, or the like. It was perfectly possible for A. to give B., C., and D. rights of way over the same road at different hours of the day, or different days of the month.<sup>5</sup>

Doubtless contracts of the innominate type (supra, § 72) would be made, giving any person, whether an owner of neighboring property or not, a right to use another's land. Such contracts merely created a personal right, and gave no interest in the land itself.

A certain number of definite rules were applied to all servitudes. Their origin is to be sought in the history of these rights.

There was, first of all, the rule that a servitude is essentially negative or passive. Its essence lies in the fact that the owner of the servient tenement does not use his property in a certain way—as in the servitude *altius non tollendi*—or permits a certain use of it by another person. It may not consist of an active duty. Easements imposing active duties are also generally repudiated at the common law, but their place is very well filled by "covenants running with the land," which may be almost infinitely various. Such covenants did not exist at Roman law. No agreements of this nature would bind any parties, except those who made them.<sup>6</sup>

<sup>5</sup> D. 8, 2, 28.

<sup>6</sup> D. 8, 1, 15, 1.

The outstanding exception to this general rule is the *servitudo oneris ferendi*, the right of support of structures on the dominant estate by structures of some sort on the servient one. At the common law, the burden of keeping the supporting structure—generally a wall—in repair was on the owner of the servitude, and he had an implied right of entry for that purpose. This was also maintained by some Roman authorities. But the rule which finally prevailed was that the servient owner must keep the wall in repair, and he could be relieved only by abandoning that part of the estate which contained the wall.<sup>7</sup>

A servitude could not impose burdens which were of no advantage to the dominant estate. A servitude that A. shall not use his land at all was not a valid servitude in favor of B.'s land, although it might well be a valid contract between A. and B. And it was equally void if it required A. to make a special use of his land, which could not be of any value to B.'s property; e. g., that A. should use only certain roads on his own estate, or not leave it, or something of that sort. Nor could there be a servitude to permit B. to do futile injuries to A.'s property, or to enjoy A.'s property in a purely personal manner, such as taking walks in it, or eating fruit in it, or dining in it. If, however, A. had a right of conducting water over B.'s property, it was a valid servitude, even if A., for one reason or another, did not need the water, and could not profitably use it.<sup>8</sup>

Another very general rule was that no one could have a servitude on his own property. That is logical enough, and yet, in practice, it seems an excessively technical and unnecessary provision. If A. had a servitude over Blackacre, and then acquired the latter estate, the servitude was extinguished, since it was fused in the title. If, thereafter, A. sold Blackacre to C., he sold it free of its former burden.<sup>9</sup>

<sup>7</sup> D. 8, 5, 6, 2.

<sup>8</sup> D. 8, 1, 8, 1; 8, 1, 14, 2.

<sup>9</sup> D. 8, 2, 26; 8, 6, 1.

Further, servitudes were indivisible. The whole servient estate owed the whole dominant estate whatever the duties of abstention or sufferance were, which comprised the servitude. If A. and B. are owners, respectively, of dominant and servient tenements, and A. divides his land between M. and N., both M. and N. will have whatever the rights of user were which A. had. However, if the servitude required the use merely of a restricted portion of B.'s land, that cannot be enlarged by A.'s act of severing his property.

The converse held as well. If B. sold his land to M. and N., A.'s servitude covered both estates, if he previously had had the right to use any part of B.'s property. But, if his servitude had been restricted to the portion now owned by M., N. has practically freed his land from a burden.<sup>10</sup>

The rule of indivisibility also affected the rule of fusion. A., in the above instance, might acquire a large part of B.'s property without destroying the servitude.

### SAME—CREATION AND TERMINATION

140. Servitudes were created in the same way that land was transferred.

In addition, they could be created by legacy, adjudication, reservation in transfer, and finally by formal stipulation.

Prescription was extended to servitudes. In the case of servitudes, good faith and *iustus titulus* were not demanded.

Servitudes could be extinguished in all the above ways. Nonuser was an especially common method of extinguishing them. A distinction for this purpose was made between "continuous" and "discontinuous" servitudes.

<sup>10</sup> D. 8, 3, 18; 8, 2, 30.

Rustic servitudes—at any rate, the oldest ones—were *res mancipi* and could be created by mancipation.<sup>11</sup> The owner of the servient tenement, having certain privileges of user of his own property, could “transfer” them to the owner of the dominant one. Urban servitudes were *res nec mancipi* and required, therefore, a sort of delivery, since mancipation was inapplicable. In later times a *quasi traditio* was possible, in which the owner of the dominant estate was expressly permitted to begin his use, and actually did begin it. Both rustic and urban servitudes could, of course, be created by *cessio in iure* (supra, § 132).<sup>12</sup>

Other methods were (1) legacy and (2) adjudication, since in a partition suit it might well be necessary to grant servitudes to either or both of the owners of the divided property. Another and perhaps commoner method was to reserve a servitude when property was transferred, however that transfer might take place.<sup>13</sup>

If the transfer of the land on which a servitude was reserved took place by delivery, it is easy to see that an effect is thereby given to mere agreements which these otherwise cannot have. The rule is expressly laid down at Roman law that title to property, ownership of any kind, is created by delivery or by usucapion, not by agreements and stipulations. But in the case in which A., the owner of Blackacre and Whiteacre, grants and delivers Blackacre to B., reserving a right of way over it for Whiteacre, A. obtains a right in Blackacre by mere consent.

What could be done in the case of reservations could be done quite generally. Agreements could be made and enforced by stipulations, which did not merely give the dominant owner a right of action *ex stipulatu*, but actually made him the owner of the servitude. This in all likelihood was influenced by the fact that in the Eastern part of the Empire it had long

<sup>11</sup> G. 2, 29; 2, 33.

<sup>12</sup> G. 2, 29; 3, 30; 2, 32.

<sup>13</sup> D. 7, 1, 6.



been customary to convey title by the delivery of written documents, much as is done in our own system at the present day. The Roman stipulation was frequently the representative of the East-Mediterranean formal contract, which was regularly in writing, although in this case it seems rather to have been the agreement itself, the pact, that had the effect of conveying.

A form of acquiring servitudes, which has played a large rôle in the English legal history, was apparently of less importance. That was prescription. Paul implies that servitudes could not have been created by usucapion. And apparently, if there ever had been any doubt of it, an old statute of uncertain date, the *lex Scribonia*, forbade it.<sup>14</sup> But, when *longi temporis præscriptio* was created, it applied to servitudes as well; but this application differed notably from its application to land. The requirements were that, in accordance with an ancient *formula*, the user upon which a prescriptive claim was based should not have taken place "by force or by stealth or as a license from the owner," *nec vi nec clam nec precario*.<sup>15</sup> This is very much like the requirement of "open, adverse, and notorious possession" of the common law. Except as far as violence was concerned, prescription in servitudes did not need either good faith or *iustus titulus*.

At the common law, long enjoyment was a very important method of creating easements, and its importance was much increased when the doctrine of a presumed lost grant was widely used. Originally proof that an easement had not existed within the time of legal memory (accession of Richard I, 1189 A. D.) would defeat a prescriptive claim, but a lost grant might be presumed after a much shorter time of enjoyment. In most jurisdictions statutes expressly fix this time, although the "lost grant" doctrine is often expressly repudiated. Courts very naturally are inclined to stress the requirement *nec precario*—

<sup>14</sup> D. 8, 1, 14, pr.; 41, 3, 4, 28.

<sup>15</sup> C. 3, 34, 2; D. 8, 5, 10, pr.

“adverse user”—lest unconsidered acts of neighborliness may oust men of their property.

While, therefore, adverse user is still a common way of creating easements in Anglo-American law, the Germanic law of Europe, curiously enough, specifically prohibited it for so-called discontinuous servitudes, such as rights of way and the like. The principal French *Coutumes*, those of Orleans and Paris, make this prohibition a fundamental rule, and it has been taken into the Code Civil (section 690). The German Code likewise abolishes acquisition of servitudes by adverse possession, except in the form of a wrongful recording of an easement in the Register of Titles, acquiesced in for thirty years (the so-called *Tabularersitzung*, section 900). The Swiss Code has the much smaller period of ten years (section 661).

Almost any method which could create a servitude could end one. Mancipation, *cessio in iure*, agreements of renunciation, confirmed by stipulation, were fully effective for this purpose.<sup>16</sup>

But if physical changes made the servitude no longer available, or no longer serviceable to the dominant tenement, it was extinguished. If A. had a right of way over B.'s land, and a change in the stream of a river flooded it, A. lost his servitude. If, however, the river dried up, or the land was restored by alluvion (*supra*, § 129), his servitude was restored.<sup>17</sup>

Servitudes were lost by nonuser, just as they were gained by user. The prescriptive period was the same, but the question often arises as to how this period is to be computed. For this purpose urban and rustic servitudes are again distinguished, not, however, on that basis, but by the fact that the former are generally “continuous” and the latter “discontinuous.”

The period in the case of a right of way—a discontinuous servitude—begins to run from the day it was last used. But

<sup>16</sup> D. 8, 6.

<sup>17</sup> D. 8, 6, 14.

what is to be done in the case of "support of buildings"—*tigni immittendi*? That consists of a sufferance on the part of the servient owner. When can he be said to have ceased to suffer the burden? Generally, it is held that the period begins when the servient owner has done some act inconsistent with the existence of the servitude.<sup>18</sup>

### PERSONAL SERVITUDES

141. The Roman personal servitude was a right attached to a particular person to make some use of the property of another. It applied to land as well as chattels, and created a claim enforceable directly *in rem*. The commonest personal servitude was the usufruct, generally granted for life. It involved a high degree of diligence in the care of the *res*, and was protected by all the possessory remedies as well as by the *actio confessoria*.

A limited user might be created by the servitudes of *usus* and *habitatio*.

Easements in gross are not altogether unknown to the common law and are generally recognized in most American jurisdictions. But the Roman easement in gross, the servitude which attached, not to one estate in favor of another, but to a particular person, was a different thing. The only important example of it was the usufruct, which came to be used in a variety of ways.<sup>19</sup> It is said to consist in such a use of a *res* by a nonowner as will leave the character of the *res* essentially unchanged. It served the purposes of the various types of tenancies at common law and apparently performed many of the functions of our trust. Indeed, as far as its origin is concerned, it seems to have been devised to satisfy the same needs as those which created the trust.

<sup>18</sup> D. 8, 2, 6.

<sup>19</sup> I. 2, 4; D. 7, 1; C. 3, 33.

The usufruct might be for a set time, but it could in no case last longer than the life of the holder, the fructuary or usufructuary. Ordinarily, indeed, it was a life interest, and this would be presumed if no limit had been set. This limitation was deduced from its personal character, but it was rather a survival of the original purpose of the usufruct, which seems to have been to make the provision for members of a family without allowing these the power of dissipating the property.<sup>20</sup>

What the fructuary had, besides a certain type of possession, which must be discussed later, was the complete right to get all the products (supra, § 128) of the *res*, if he chose to. They became his when he took effective possession of them, whether he consumed them or not. What were *fructus* has already been indicated. It included mines, if some had already been opened; trees, if wood was one of the ordinary products of the estate. But neither of these was included, if the above-mentioned conditions did not exist. That is to say, he might not commit waste, whether legal or equitable. The English law on this matter has taken over the phraseology of the Roman system. The fructuary, as well as certain other bailees (supra, §§ 65, 68), must take care of the property, as a *bonus paterfamilias*, the "good husbandman" of the English cases. He must keep it in repair, protect it against trespass, and restore it reasonably intact. If he has the usufruct of a herd, he must complete the number, if any animals have perished or otherwise been lost. He must pay taxes and assessments to the state, or reimburse the *dominus* if the latter has paid them.<sup>21</sup>

Any injury to the property which would make a stranger liable for *furtum*, or under the Aquilian law, would be equally actionable against the usufructuary.

Strictly speaking the usufruct could not be alienated; that is to say, no fructuary could completely divest himself of his duties in respect to the *res*. But he is said to have the power

<sup>20</sup> D. 7, 4, 3, pr.; 7, 4, 3, 3.

<sup>21</sup> D. 7, 1, 9, pr.; 7, 1, 13, pr.

of letting or pledging or selling the actual enjoyment, which is, in other words, the power both of assigning and subletting. The fructuary always remained liable to the *dominus*, but had all claims against his assignee or sublessee that his contract called for.<sup>22</sup>

His possession was protected both by the ordinary servitude action, the *actio confessoria*, which was *in rem*, and also by special interdicts, while an unfounded claim to a servitude could be barred by an *actio negatoria*, which was, in effect, a declaratory judgment, since any unauthorized possession or trespass could be reached by delictual actions or by vindication and interdict.<sup>23</sup>

One of the *senatus consulta* of the early empire was interpreted to mean that a usufruct of fungible goods might be created by will. The so-called fructuary, of course, became the owner of the oil or wine or money so bequeathed, but had to furnish security (*cautio*) that he would restore it on his death. A life income might even be created by bequeathing the usufruct of a claim, in which case the fructuary had the right of collecting the income of an investment. As far as they were applicable, the rules of the ordinary usufruct were extended to this one.<sup>24</sup>

A much more limited right was the servitude of *usus*. The usuary could use the property, but only for himself, his family, and slaves and guests, who shared his house. He could neither assign nor sublet his enjoyment. He could take fruits necessary for his use, but no other, and he was required by the edict to give security that his use would be exercised only to this limited extent.<sup>25</sup>

Two special varieties of usufruct were *habitatio*, the right of living in a particular place, and *operæ*, the right of getting the labor of particular slaves, or perhaps particular animals.

<sup>22</sup> D. 7, 1, 12, 2.

<sup>23</sup> D. 8, 5, 2.

<sup>24</sup> Ulpian, Reg. 24, 27; D. 7, 5, 1.

<sup>25</sup> D. 7, 8, 2; 7, 8, 4.



They were of minor importance. Like *usus*, *habitatio* was apparently only created by will; but, unlike *usus*, it could be used as a source of profit, since the enjoyment might be sublet.<sup>26</sup> *Operæ* had the special characteristic that it might survive the life of the holder, if a term was specified. Perhaps, without specification, they would normally last as long as the slave or animal lived.<sup>27</sup>

### *DAMNUM INFECTUM AND OPUS NOVUM*

141a. Two special remedies protected an owner of property against dangerous structures on adjoining land, and against change on his neighbor's land which might be prejudicial to him.

Two special remedies of the owner of landed property constituted in fact a restriction on the land of his neighbors. If a building threatened collapse, an action might be brought by an adjoining owner, under the prætor's edict, the action *de damno infecto*, "for damage not yet done." In a proper case, the prætor would compel the defendant to give security in the form of a prætorian stipulation (supra, § 57), or, if that were refused, would permit the plaintiff to enter into possession of the dangerous edifice.

A still more striking instance is the *operis novi nuntiatio*, the "injunction against a contemplated construction." Any structure or demolition which A proposed to carry on on his own land could be suspended by formal notice to A on the part of his neighbors. It would then be determined whether any legitimate interests of these neighbors were in fact prejudiced. The remedy for disobedience was by mandatory interdict (supra, § 23). It will be seen that this remedy would have provided for many of the problems arising out of facts presented in *Rylands v. Fletcher*.<sup>28</sup>

<sup>26</sup> D. 7, 8, 10.

<sup>27</sup> D. 7, 7.

<sup>28</sup> I owe this suggestion to Professor W. W. Buckland.

## CHAPTER 21

## POSSESSION AND GIFTS

## Section

- 142. Meaning of the Term "Possession."
- 143. Possession and Right to Possession.
- 144. The Interdicts.
- 145. Gifts.

## MEANING OF THE TERM "POSSESSION"

142. "Possession" is a term generally defined in contrast with ownership. It is further differentiated from cases in which the holder has merely physical control by assuming an "intent to possess." This was the theory of Paul among ancient writers and Savigny among modern ones. The theory was severely criticized by Ihering.

The many situations in which the term is used will not quite fit the differentiation attempted.

The common law had a term of great importance in the law of property, which was called "seisin." It was in fact common to the English law and to the customary law of Northern France, and has been aptly termed a mysterious thing. At least equally mysterious and equally protean is the Roman term "possession."

The ideas contained in the Roman term *possessio* are, to say the least, not clear. What it meant at Roman law has been the subject of heated controversies, and what the essentials of the concept are, whether in its historical development or in its present form, is an equally agitated topic. On the Continent, the names of Savigny, Ihering, Saleilles, and Huber<sup>1</sup>

<sup>1</sup> Savigny, Fr. C., *Das Recht des Besitzes* (6th Ed.) Giessen, 1837; Ihering, R. v. *Der Besitzwille*, Jena, 1889; Saleilles, R., *De la Pos-*

are particularly associated with this discussion; but, in fact, every jurist of note has at some time or other been compelled to address himself to the problem.<sup>2</sup>

The usual and the simplest way of stating the characteristics of possession is to distinguish it from ownership. The one, we are told, is a relation of law; the other, of fact. This distinction is expressly asserted in the Swiss Code, sections 641 and 919. Almost every discussion of the subject begins in that fashion.

It must be evident that this cannot really be so at all. Possession is a relation of law quite as much as ownership, and it would be proved to be such by the very fact that lawyers discuss it. Whether it is more of a fact than ownership depends solely on what our method is of determining what a fact is. As far as law goes, both possession and ownership are either relations between persons in respect of things or they are not relevant facts at all, and, if they are such relations, it is difficult to see how one can be more of a fact than the other.

Ulpian used a mental element as the basis of discriminating ownership from possession: "The difference between ownership and possession is this: That ownership remains when he who has it does not wish to be owner; possession, however, disappears as soon as the possessor has determined not to possess."<sup>3</sup> The distinction will scarcely give us much assistance. States of mind are hard to discover. And if the states of mind are indicated by acts, Ulpian's difference will not hold. If A., the owner of a *res*, indicates his wish not to be owner by throwing it away, he has divested himself of ownership. If A., the possessor of a *res*, indicates his wish not to possess by the same act, he has lost the effective control, and no longer actually possesses.

session des Meubles, Paris, 1907; *Éléments de la Possession*, 1894; Huber, E., *Die Bedeutung der Gewere*, Bern, 1894.

<sup>2</sup> Windscheid-Kipp, *Lehrbuch des Pandektenrechts*, § 148.

<sup>3</sup> D. 41, 2, 17, 1.

Let us look at a number of cases in which the question arose at Roman law. The usufructuary is stated to have had possession, but not the *conductor*; i. e., the tenant or hirer. The *emphyteuta* had possession; so, generally, the pledgee. It is quite true that this is called possession of a different kind, but the term is used in these cases, and the kinds of possession are all distinguished from "natural" possession. The commodatary, the depositary, had no possession, nor, we must suppose, the mandatary, or *negotiorum gestor*, who often had physical control of another's property. On the other hand, the tenant at will (*precario rogans*) and the *sequester* (stakeholder or escrow holder) did have possession, and certainly the *bona fide* holder of property which had not been stolen. However, even the *mala fide* occupant of an unclaimed inheritance was a possessor, although a thief was not, nor any one who claimed through a thief, however undoubted his own good faith.

Now, every one of the persons described certainly had the physical control of a *res* of which he was not *dominus*. The possession which is accorded some and denied others at Roman law was accordingly a technical term and, taken in its strict sense, meant something over and above physical control. Paul long ago found a formula to distinguish this technical and proper *possessio* from any other, by declaring that this type demanded a holding both *animo* and *corpore*.<sup>4</sup> The possessor must think himself *dominus*. All other possession was merely "natural" or "corporal" possession, and received the designation of "detention."

In its unqualified form, the distinction is obviously defective. The *sequester*, the pledgee, the usufructuary, do not think of themselves as *domini*, but do possess, at least for some purposes. The *bona fide* purchaser of a stolen article does not possess, although he has undoubtedly the *animus* required by Paul. The difficulties could be resolved only by fictions and constructions and presumptions, and were so resolved by Sa-

<sup>4</sup> D. 41, 2, 3, 1.

vigny, who gave the theory of Paul an almost universal currency. Ihering's criticisms of Savigny have been widely accepted in what may be called the upper strata of legal theoreticians, but the apparently clear and simple cleavage made by Savigny is still tenaciously maintained by a certain number, even to a certain degree by M. Girard.<sup>5</sup> To Ihering the necessary *animus* is simply the consciousness of those particular acts which one is doing in connection with a *res*.

There are difficulties here as well. Somehow the control exercised by a slave or a *filius-familias* must be excluded from this, and again we must include the situation in which the thing we call our own and deem we possess is as a matter of fact at some distance. All this requires mental constructions, although they are less complicated and violent than those offered by Savigny. We can hardly do otherwise than accede to the statement of Buckland and Girard that the Roman theories on the subject were not completely coherent.<sup>6</sup>

As a matter of fact the two degrees of possession did not suffice the Romans. They had a kind of control called *in possessione esse*, "to be in possession," which Ulpian said was vastly different from *possidere*, "to possess." He had in mind the custody of one who takes charge of property in order to prevent loss. And again there was a *possessio pro possessore*, "possession for the possessor," which might be predicated of a highway robber.<sup>7</sup>

The Romans, therefore, had exactly the same difficulties as those we encounter when we attempt to restrict the meaning of a term which has wide currency in non-legal contexts. *Possidere* was a common word in Latin, and, unqualified, it frequently meant just what the lawyers wished it to mean only with the adjectives "natural" or "corporal" added to it. It meant "to have the effective actual control of something." And again, in ordinary usage, "*possessio*" often suggested

<sup>5</sup> Girard, Manuel (7th Ed.), pp. 281-283.

<sup>6</sup> Girard, Manuel, pp. 274, 280, note 3; Buckland, Text-Book, p. 201.

<sup>7</sup> D. 4, 2, 14, 2; 5, 3, 11, 1.



something precise and limited, the quasi ownership of public lands leased out to certain persons and long leases.<sup>8</sup>

## POSSESSION AND RIGHT TO POSSESSION

143. The fact of physical control of an article at once gives certain claims in respect of it. There is a different group of such claims in every situation, generally called "possession." It is impossible to make any particular claim or group of claims an essential characteristic.

Probably the most fertile cause of the uncertainty is the confusion between the literary sense of "possess"—also necessarily employed by lawyers—which signified the fact of control so often referred to, and the legal right to such possession, which is often called by the same name. And by the "legal right to such possession" we mean generally the right to recover this control or to repel attacks upon it.

In his discussion of Ihering, Buckland gives the following illustration: "I possess my carriage in the roadway in front of my house. I should not possess my watch lying in the same place."<sup>9</sup> What is the difference between the two kinds of "possession" involved? In both cases, the "possessor" deems himself the owner. Shall his ignorance of the fact that the watch is there, and his knowledge that the carriage is there be the basis of the distinction? That will hardly prove a practicable test. However, it is evident that we can say the following: Almost any person taking the carriage and driving off in it would be a thief, subject to actions of *furtum*, and those associated with it subject to criminal action at the owner's instance, subject to the interdicts concerning movables. In the case of the watch, on the other hand, all these claims would exist only on the precedent condition of demand and refusal, or similar acts which would make a continued retention unlaw-

<sup>8</sup> G. 2, 7; D. 12, 6, 15, 1.

<sup>9</sup> Buckland, Text-Book, p. 200, note 4.

ful. The relation accordingly between the owner and other persons in respect of these two articles is different. In the former case it is made up of a complex of rights, etc., that is not identical with the complex in the latter case, but is very similar to it.

There is also a historical reason for the emphasis of the "mental" element in Roman discussions of possession. It is very likely that the term got its first legal prominence in connection with usucapion and prescription. In usucapion, a person who is not the owner gets *bona fide* control of a *res* and after a certain time becomes owner. He need not use it. He need merely have it. And he has it as long as he excludes all but his appointees from having anything to do with it.

Now, if the possession which can become ownership by mere lapse of time is taken as typical, we can readily see the basis of Paul's statement. Such a possessor certainly has the *animus dominantis*; he regards himself as *dominus*. If this is the fundamental type of possession, we can see why a tenant, a commodatary, a depositary, did not have it. Plainly they could never lay claim in equity to a title superior to that of the source of their interest. Their holding adverse to the *dominus* could never be *bona fide*.

But what shall we say of the usufructuary, the *emphyteuta*, the pledgee, the *sequester*, who are all said to have possession? As a matter of fact, in the case of the first three, possession in some texts is denied them, though specifically granted in others. We can reconcile the contradiction generally by assuming that possession proper, the strict technical possession, was in fact, if not in terms, divided into two classes. There was the possession which by usucapion might become title, and the possession which could not. The possession of the usufructuary, the *emphyteuta*, the pledgee, the *sequester*, was not usucapion possession.<sup>10</sup>

<sup>10</sup> D. 2, 8, 15, 1; 16, 3, 17, 1; 41, 3, 16; 43, 26, 4, 1. Cf. Riccobono, Zeitschrift der Savigny Stiftung Röm. Abt. 31, 321-371; Albertario, Bolletino del Istituto del Diritto Romano, 27, pp. 275-295.

## THE INTERDICTS

144. The one characteristic method of protecting possession was a complicated procedure, called the interdict. It was of ancient origin, and some interdicts received special names, such as the interdicts, *utrubi*, *uti possidetis*, and *unde vi*.

What was the second kind? Its characteristic was that it gave the right to use the interdicts, that special form of action of which brief mention has already been made.

The effectiveness of interdictal procedure has been disputed. Its origin is equally in doubt. It is maintained by some that the interdicts were special forms of action delictual in their nature. Others, principally Pernice, have seen in them primarily measures of police intended for general security. It is certainly not impossible that both ideas contributed to their growth. The system may have been devised to secure for quasi owners, viz. prætorian owners of *res Mancipi*, and particularly the long-term lessees of state lands, the protection of which their lack of title deprived them at the civil procedure. But, once established, the interdicts were turned very early into a means of maintaining the proprietary *status quo* in all cases in which a judicial determination of ownership was available.

The possession that is ascribed to the pledgee, the usufructuary, and the rest was interdictal possession merely, the right to use the interdicts, or, more correctly, the right to use two of them, those named *uti possidetis* and *utrubi*, from the opening words of their *formulae*.

Unfortunately for the validity of the distinction, a tenant or a depositary, whose possession was *naturalis*—i. e., properly not possession at all, but merely detention—could use one of the interdicts, the *interdict unde vi*, if he had been forcibly dispossessed. More than that, a brigand, whose tenure was violent as well as wrongful, could use this latter interdict. A kind of inter-

dictal possession was therefore to be asserted, even of these groups.<sup>11</sup>

Were they protected because possession is the usual badge of ownership, or because possession is in itself a social good, deserving of maintenance? We are again in the heart of the controversy, but for our present purposes the various reasons 'proposed are immaterial. It is not too bold a statement that the attempt of making *possessio* a technical term of law with a specific content failed at the Roman law, whatever may have been its success in the modern civil law or at the common law. What we have is a series of relations which ranged from the almost complete legal capacities of a man holding a *res Mancipi* without mancipation to the temporary and precarious tenure of a thief, in every one of which the powers, privileges, and claims were somewhat different. If it served any useful purpose, these relations might all be called possession. But the only meaning we can have when we apply this general term is to assert that in no one of these cases could the person entitled bring a special type of action known as vindication.

That there should be many classes of persons having physical control over a thing whose complex of privileges, powers, and claims in respect of it are all different, is not in the least surprising. There were certainly many more classes than any we have so far enumerated, and the nature of the situation and the character of the thing involved can generally be made the basis of a new classification, because they will generally modify the complex of rights and powers which the possessor has.

The result is precisely the same as in the case of *dominium*. The *dominus* of a slave has privileges notably different from the owner of an ox. Further, such characteristic elements of *dominium* as the power of transfer may be wholly or partially limited without depriving the owner of his designation. Restraints on the amount of gifts, the manner of making them, the person who could receive them, were quite general. A fiduciary, who had title, could make transfers only to a limited extent.

<sup>11</sup> D. 43, 16.

Similar limitations existed against a prodigal, who had been placed under wardship. That is to say, while large general groups existed in which the complex of rights were nearly identical, there were a great many smaller groups in which the number and kind of these rights were slightly different, and in all of them *dominium* was said by law to be present.

Just so, in the case of possession, it is not really possible to divide the various situations into two or even three classes. Most of them have in common the fact that the possessor has physical control of the *res*, but that is not always necessary. When we say that the gratuitous borrower has no "possession," we may mean that he cannot bring the interdict *utrubi* or *ubi possidetis*, if he is dispossessed. But he may still bring the interdict *unde vi*, and often an action of *furtum*; and he is therefore not without legal claims arising from his control of the *res*, even if we call it merely "natural" possession. Again, when, as is sometimes the case, a fructuary is said not to "possess," it may mean that he cannot become the owner by usucapion.

Much of the mystery of the term disappears if in each case we set ourselves to find out what the claims and powers were of the man who is granted or denied possession.

## GIFTS

145. The two types of gifts, *inter vivos* and *mortis causa*, were derived from the Roman law. In both of them delivery was necessary to confer title. There were several characteristics of Roman gifts, which were not taken over into the common law.

Gifts were revocable for ingratitude of the donee. The power to make gifts was limited by various legislative acts.

Gifts *mortis causa* were assimilated to legacies, and made subject to most, but not all, the conditions of legacies.



The two forms of gift known to the common law, the gift *inter vivos* and the gift *mortis causa*, are in terms and substance taken over directly from the Roman law, and in general the rules are the same in both systems.<sup>12</sup>

There was, however, one marked difference, which was of great practical importance. A promise to make a gift is, of course, void at the common law, unless made under seal, because of lack of consideration. At Roman law, if the promise was made by stipulation, it was valid. In both systems, accordingly, the formal promise to make a gratuity created an obligation, but the stipulation is so much simpler than the sealed covenant that we may assume that such promises were vastly more frequent at Rome than under our system. When the enforceability of all agreements became the rule in the later civil law, agreements to make gifts were included, and such contracts are generally valid at the present day in the countries of modern Europe.

But, both at Roman law and at English law, title to the property donated passes only by delivery. In the case of a gift of a chose in action, no delivery was possible, and mere agreement was sufficient. Justinian made it possible to transfer the title to land by delivery of a document in the case of donation, the document taking the place of the long obsolete mancipation.

Donations *inter vivos*, at Roman law, had the further special characteristic that they were essentially revocable, though not arbitrarily. The one common reason for such revocation was ingratitude of the donee. The fact of ingratitude had to be determined by the court. It seems that property revested at once in the donor, but that is not quite certain.<sup>13</sup>

If the gift had been conditional, failure of the condition at first created merely a right to recover, but later an actual title, enforceable by a *vindicatio utilis*.

The abuse of the power to make gifts was early the subject of

<sup>12</sup> Bracton 2, 5; Cochrane v. Moore, 25 Q. B. Div. 57; I. 2, 7; D. 39, 5; C. 8, 53.

<sup>13</sup> C. 8, 65, especially, C. 8, 65, 10.

legislation. An old statute, the *lex Cincia* of 200 B. C., limited the amount which might be given to a person not in the family, but the right to avail himself of the *lex Cincia* was confined to the donor. Under the Empire, gifts, to be irrevocable, had to be registered, and by Justinian failure to register a gift made it void, to the extent that it exceeded 500 *solidi*.<sup>14</sup>

The other type of gift was the *donatio mortis causa*, a gift made in contemplation of death. It was therefore revocable if death did not ensue from the cause apprehended, or if the donee predeceased the donor. It has perhaps been best described by Marcian, when he says that a gift *mortis causa* indicates that the donor would rather have the thing himself than give it to the donee, but would rather have the donee have it than the donor's heir.<sup>15</sup>

It did not need a present illness to be valid. A person about to go on a perilous journey, or to make a sea voyage, might make a gift *mortis causa*, or while a hostile invasion was in progress. Indeed, the mere "contemplation of mortality" was enough, which is certainly broad enough.<sup>16</sup>

There was a type of gift *mortis causa* in which delivery was made at once, but title was not to pass till death. These gifts were plainly revocable, and till the death of the donor were little better than grants to hold at will, *precario*, except that, if not revoked, title vested.

If, in the ordinary *donatio mortis causa*, the danger which motivated the gift passed, the donor might bring an action to get his property back. Under Justinian, the title revested *ipso facto* in the donor.

Gifts, whether *mortis causa* or *inter vivos*, could frustrate the reasonable expectancy of a man's natural beneficiaries, quite as readily as bequests in a will. For that reason gifts *mortis causa* became gradually assimilated to legacies. The Falcidian

<sup>14</sup> Fragmentum Vaticanum, § 298; Cicero, *De Oratore*, 2, 71, 286; C. 8, 53, 35, 3; Nov. 162, 1.

<sup>15</sup> D. 39, 6, 1.

<sup>16</sup> D. 39, 6, 2.

quarter was applied to them, and the law of lapses was next made to cover them (infra, §§ 158, 164). But they did not quite become the same as legacies. They did not depend upon a will, for one thing, and they were not forfeited if a will was attacked by the donee, as would be the case if a legatee attacked a will.<sup>17</sup>

Further, when testamentary disposition in favor of strangers was restricted, this restriction was extended to gifts. Wills which violated natural affection were declared to be undutiful, *inofficiosa*, and a special action, the *querela inofficiosi testamenti*, was created to avoid them. This *querela* was extended to gifts in general by imperial rescript. The conditions under which it might be brought are fully discussed under wills (infra, § 165).<sup>18</sup>

<sup>17</sup> I. 2, 7, 1; D. 39, 6, 17, 37; C. 8, 57, 4, 8, 57, 4.

<sup>18</sup> C. 3, 29.

## CHAPTER 22

## TESTAMENTARY SUCCESSION

## Section

- 146. Nature of *Hereditas*.
- 147. Ancient Forms of Wills.
- 148. *Testamentum Tripertitum*.
- 149. Contents of a Will.
- 150. Conditions in the Appointment of a *Heres*.
- 151. Substitutions.

NATURE OF *HEREDITAS*

146. The *hereditas* was the complex of rights and obligations which a deceased *paterfamilias* had at the moment of his death.

It survived him and was capable of independent existence as a quasi person. Until a successor in some way qualified, it was *hereditas iacens*.

The qualified successor was the *heres*, who is neither the "heir" nor the "executor" of the common law, but has something of the characteristics of both.

The *heres* was appointed by a will, *testamentum*.

The *paterfamilias* was mortal. What happened when he died? He had, at least potentially, every claim, privilege, power, and immunity that a member of the Roman community could have. Where did these go on his death? The rules concerning such matters are certain to be extremely technical, because they are likely to be the outgrowth of the special conditions in which the community developed. We have taken over into the common law, in a mass, a certain number of the Roman rules and a still larger number of Roman terms; but we have not taken what was the most striking element in this part of the Roman system, the idea of universal succession.<sup>1</sup>

<sup>1</sup> D. 37, 1, 3, pr.; 50, 16, 208; D. 48, 20, 7, pr.

We need not trouble ourselves to consider whether a period of communal ownership lay behind the well-developed system of private property that we find in Rome in the earliest period of which we know. The *paterfamilias*, both in theory and fact, owned for himself a great many rights and claims and powers, owed many obligations, and was subject to many liabilities. On his death they remained a unit, and passed completely to some other persons, or to several other persons jointly. But these persons were themselves owners of claims and powers, debtors of obligations. The new group coalesced completely with the old one, so that a solvent estate might become insolvent by being acquired by a hopelessly indebted heir, or the acquisition of an insolvent estate might bankrupt a solvent heir.

The idea of a universal succession, accordingly, was that a person's legal identity was in a sense continued, at any rate until this merger takes place. In the case of death it is explicitly said that the *hereditas*, the complex of legal relations is the artificial extension of the person of the defunct *paterfamilias*. There were other cases of universal succession—the *bonorum emptio* of bankruptcy (supra, § 115), and a few penal cases, abolished by Justinian.<sup>2</sup> In all of them, the governing idea is that a succession has a *passive* as well as an *active* side; that is, involved liabilities and duties, as well as powers and claims. But the best example of universal succession is, after all, the case of inheritance.

The medieval civilians contrasted the term "singular succession" with the term "universal succession." The Romans did not use the former expression helpful as it is, although they, too, were aware that a purchaser or donee was different from a *heres*, only in the fact that he took over a specified number of the legal privileges and powers and claims of his predecessor in title, instead of an unresolved and complex body of them. But, besides the fact that "singular" succession is rarely applied to the case of obligations, the universal succession involved in in-

<sup>2</sup> I. 3, 12.



heritance had a special feature. In all other cases succession consisted in a merging of a complex of legal relations, in the destruction of those legal relations in one holder, and in a simultaneous creation of identical or similar ones in his successor. But the *hereditas*—that is, the complex of relations left without a holder by the death of the *paterfamilias*—could exist for an appreciable time without a holder.<sup>3</sup> They were sufficiently cohesive to remain as a unit when the *paterfamilias* died, until the appointed heir actually took them, or a stranger in his place seized them. Once taken or seized, the effect was the same as in all successions. The various rights and obligations thus acquired became indistinguishable from those the acquirer already had. But in the interval the *hereditas*—the “estate”—was called “*hereditas iacens*,” and was, in later law boldly classed as a legal person, just as corporations proper.<sup>4</sup>

Like any other such person, the *hereditas* was not quiescent. Its property could increase by natural means, such as the growth of corn or the young of animals. The slaves of the estate could acquire property for it. But the most striking rule that prevailed at the Roman law for a long time was the fact that a *hereditas iacens* could be seized by the first comer, without the faintest claim of right, and this man within a year would, by *usucapio pro herede* (supra, § 134), in a great many instances, become the owner. The obvious purpose was to end the *hereditas iacens* as soon as possible, by bringing pressure on the proper successor to take what belonged to him, and when Hadrian abolished the *usucapio pro herede*, by permitting the heir to claim at any time, other methods were employed to shorten the period of ownerlessness as much as possible.<sup>5</sup>

The true and proper successor of the *paterfamilias* was the *heres*. The word which is derived from it in the Anglo-Ameri-

<sup>3</sup> D. 46, 1, 22; 28, 5, 31, 1; 37, 1, 3, 1.

<sup>4</sup> D. 36, 4, 5, 20; 37, 3, 1.

<sup>5</sup> G. 2, 52, 53.

can system, "heir," is so different in meaning that the Latin term will be regularly used for the Roman institution.

First of all, the word "heir" suggests intestacy. In the feudal concept of landed property—in connection with which most of the common law was formulated—the lordship or ownership was continuous; one holder succeeded another at once. Indeed, there was never a real break. For a long time there was no will possible of lands, and, when wills were instituted for lands, entails had become extremely common. Under such circumstances the heir apparent was in a sense a co-owner in his predecessor's lifetime. The Roman "*heres*" was not the co-owner in the lifetime of the *paterfamilias*. Whether *heres* by intestacy or by will, his rights, once they became vested, were those of the owner of whatever was in the estate, subjected to its obligations and to the additional obligations created by legacies and testamentary trusts. As soon as the *heres* qualified, he could vindicate the property of the estate wherever it was. It will be noticed that some of his duties are those of a modern "executor."

Now, we must assume that at Rome, also, there was a period that preceded the existence of wills, when all decedents were necessarily intestate. All over the Mediterranean, wills are known to have been introduced at a definite time. But, at Rome, that time lies before any period of reliably recorded history. At the time of the XII Tables, wills were already an established institution, and intestacy, in all likelihood, an exceptional case. And the primary purpose of the will was at all times to appoint a *heres*, a successor, in whose person the legal personality of the deceased was merged, since he not only took over all that he had, but all that he owed, and was liable as well for the religious duties, the *sacra*, which might have been connected with the property rights of the deceased. These religious duties played an important part in determining the attitude of the Romans to the whole matter of testamentary institution.<sup>6</sup>

<sup>6</sup> G. 2, 55.

## ANCIENT FORMS OF WILLS

147. (a) The oldest will was by special statute, *testamentum in comitiis calatis*.  
 (b) The *testamentum per æs et libram* was made by manumission. The grantee, the *familiæ emptor*, held in trust for the testator in his lifetime and for the beneficiaries after the testator's death.  
 (c) Any document (*tabulæ*), sealed by seven witnesses and formally correct, would be given the effect of a will by the prætor (*bonorum possessio*).

Apparently an equally early function of the will was to manumit slaves or to appoint tutors for minor children of the testator. But the appointment of the *heres* was its most important element. It was the first provision in the will, and until very late everything before it was surplusage, if it qualified the position of the *heres*.

The history of wills is a complicated one at Roman law, as elsewhere. We not only can trace it fairly well for a great many of its stages, but it is necessary to do so in order to understand the later Roman will, and the modern forms developed from it.

The oldest will was that made by special statute—the *testamentum in comitiis calatis*. Twice a year, the Roman legislative assembly—the *comitia* (supra, § 7)—was summoned officially in a special manner (*calata*), and proceeded to vote in a special organization, by *curiæ*, on proposals of this nature. A *paterfamilias* orally appointed a *heres*, manumitted certain slaves, or selected guardians—all to take effect on his death. And the *comitia* voted its assent. It is likely that, at or before the XII Tables, the comitial assent was a formality, and the purpose of having the *curiæ* present rather than of making a public record of the matter, but it can hardly have been so originally.<sup>7</sup>

<sup>7</sup> I. 2, 10, 1; G. 2, 101.

The cumbersomeness of this procedure, the fact that the *comitia* could be summoned for this purpose only two days in the year, created a new type of will, the *testamentum per æs et libram*.<sup>8</sup> This was an obvious application of the mancipation. The *paterfamilias* transferred title to his whole estate to his intended heir, called for this purpose the *familiæ emptor*, who was in good conscience required to carry out the detailed instructions of the testator. Later the *familiæ emptor* became little more than a formal witness or channel of transmission to the real beneficiaries of the will, not unlike the testamentary trustee of both the Roman and the common law.<sup>9</sup>

The obvious defect of the will *per æs et libram* is its irrevocability. We think of a will as essentially ambulatory. It is a disposition which a man may make as frequently as he chooses, and modify as freely as he wishes. By its nature, it has no effect till the moment of the testator's death. This will, on the contrary, makes the *familiæ emptor* an owner, subject to conscientious duties in respect of the estate, but not capable of being dispossessed, except by remancipation to the testator, or to some one else at his request.

When the *familiæ emptor* became a mere trustee, he held himself bound to dispose of the estate in accordance with any written will the testator had made, or might in future make. By this time the mere honorary or conscientious obligation had become a legal one, and the irrevocability gone. The will had, accordingly, all the characteristics we are accustomed to assign to such transaction, yet this form was not satisfactory and gradually disappeared.

The prætors had, long before the will *per æs et libram* became obsolete, interfered in these highly important matters. Any written direction of a testator, fulfilling the conditions which always qualified testamentary disposition, the prætor would give effect to, by putting the *heres* named in these directions into effective control of the estate. He would give

<sup>8</sup> I. 2, 10, 1; G. 2, 102.

<sup>9</sup> I. 2, 10, 1; G. 2, 103.

him *bonorum possessionem secundum tabulas*. The term *bonorum possessio* became the regular expression to describe an inheritance which depended for its validity on the prætor.<sup>10</sup>

But the will, the *tabulæ* which the prætor would treat as a will, must fulfill certain formal conditions, as well as substantial ones. It must bear seven seals. In this case, the number seven was arrived at simply by adding the seals of the five witnesses of the transaction *per æs et libram* to the seals of the testator and the trustee.

### TESTAMENTUM TRIPERTITUM

148. This was the final will of the Empire. Its requirements were:

- (1) A written document sealed by the testator.
- (2) The seals of seven witnesses.
- (3) The subscription of the testator and witnesses.

Under special circumstances the formal requirements were relaxed.

Under Justinian, holograph wills were allowed by parents in favor of their children.

Nuncupative wills were permitted under special circumstances.

Military wills were freed from nearly all formal requirements.

Under the Empire, the written and signed will of the Greek East could not be disregarded. There were accordingly a large number of wills in the later Empire, which were all valid under certain conditions. The situation was clarified by a constitution of the emperors Theodosius and Valentinian of 439 A. D., which established the *testamentum tripertitum*, the "will of threefold origin." This will, to be valid, had to be a single written document, sealed by the testator and by seven witnesses, and then subscribed by the testator and these witnesses.

<sup>10</sup> I. 3, 9; D. 37, 1.



If the testator could not write, an eighth subscribing witness was demanded.<sup>11</sup>

There were situations in which the rigorous insistence on the prescribed forms were relaxed. In times of pestilence, the witnesses and testator need not sign in each other's presence. Wills made in the country were valid with only five witnesses. Deaf mutes, unless the incapacity was congenital, might make a will, if it was wholly in their own handwriting. In the case of blind testators, the signature of the testator must be replaced by that of an official and public notary, the *tabellio*.<sup>12</sup>

Holograph wills—that is, wills written wholly in the handwriting of the testator—were for a short time valid without witnesses. Justinian abolished them, except in the case of wills made by parents in favor of their children.<sup>13</sup> It is noteworthy that they were reintroduced into European systems by the French Civil Code,<sup>14</sup> and have been adopted in some American states, notably California.<sup>15</sup> The privilege is widely used and has obvious dangers. Formality and the presence of witnesses undoubtedly present a certain check upon various kinds of fraud, and it is significant that Justinian in testamentary matters reintroduced technical forms which had been abolished for several centuries, although the general tendency of this legislation was to remove technicalities.

There was a type of will in the East which maintained itself long after the *testamentum tripertitum* had become common. This was the will which consisted in a formal declaration before a magistrate, who would then draw up a written summary of the will to be deposited in the local record office, or in the imperial chancellery. This "public will" never ceased to be a valid form of disposition, and was formally recognized as such in law. More than that, a merely oral will before sev-

<sup>11</sup> C. 6, 23, 21.

<sup>12</sup> C. 6, 23, 29.

<sup>13</sup> C. 6, 23, 21, 3.

<sup>14</sup> Code Civil, § 970.

<sup>15</sup> Civil Code, § 1277.

en witnesses (nuncupative will) seems to have been valid even under the *Corpus Iuris*, although it is hard to see what point the technical requirements of the tripartite will had, if such oral testaments were possible. They were plainly not common. In general, men would prefer to give unmistakable evidence of their intention, rather than leave it to the joint memory of seven witnesses.<sup>16</sup>

There was still another type of will, which was consciously meant to be the exceptional privilege of an important class. In the case of soldiers, who died on campaign and within a year after honorable discharge, validity was allowed wills in which all formalities of substance or form were disregarded. They were not held to the rules of passive or active testamentary capacity (infra, §§ 152, 154); the will might be oral or written, might be without any fixed number of witnesses, and, if in writing, wholly without witnesses; it might dispose of part only of the estate (infra, § 149). The basis for this special rule was said to be the rudeness and ignorance of professional soldiers (*imperitia militaris*), but it was in fact rather the desire of vesting in this indispensable profession a number of valuable privileges.<sup>17</sup>

## CONTENTS OF A WILL

### 149. A will must—

- (1) First appoint a *heres*;
  - (2) Distribute the shares of various *heredes* by fractions of the Roman coinage unit (*as*);
  - (3) Distribute the entire property.
- Specific pieces of property might be allotted to named *heredes*.

(1) A will must, first of all, appoint a *heres*, whose function, as successor to the estate of the decedent and continuer of his personality, has already been adverted to. If no *heres*

<sup>16</sup> C. 6, 23, 21, 4.

<sup>17</sup> D. 29, 1; C. 6, 21; I. 2, 11.

is mentioned, or if the *heres* predeceases the testator, the will is wholly ineffective and the *paterfamilias* is intestate. But there may be several *heredes*, and in that case they hold the estate jointly, with the incident of joint tenancies at common law; i. e., survivorship. If one of several *heredes* died before the testator, the survivor or survivors took the entire estate.<sup>18</sup>

But it was usual to determine in what proportion the *heredes* should take the estate when it was finally distributed among them. This had from time immemorial been done by treating the entire estate as equivalent to one *as*, the ordinary measure of value. The *as* was composed of twelve *uncia*, and the following table gives the usual fractional expressions employed:

<i>Uncia</i>	..	1/12—	
<i>Sextans</i>	..	1/6 — 2	<i>uncia</i>
<i>Quadrans</i>	..	1/4 — 3	"
<i>Triens</i>	..	1/3 — 4	"
<i>Quincunx</i>	..	5/12— 5	"
<i>Semis</i>	..	1/2 — 6	"
<i>Septunx</i>	..	7/12— 7	"
<i>Bes</i>	..	2/3 — 8	"
<i>Dodrans</i>	..	3/4— 9	"
<i>Dextans</i>	..	5/6 —10	"
<i>Deunx</i>	..	11/12—11	"
<i>As</i>	..	—12	"

If a will contained the provision, "Let A. be *heres ex quadrante*, B. *ex semisse*, C. *ex sextante*, and D. *ex uncia*," the estate on distribution would be divided among A., B., C., and D. in the proportions of 3, 6, 2, and 1.<sup>19</sup>

If the total amounted to more or less than 12 parts, that total was the denominator of the fraction. Suppose the will appoints A. *ex quadrante* (3), B. *ex quincunce* (5), C. *ex besse*

<sup>18</sup> I. 2, 10; D. 28, 1; C. 6, 23.

<sup>19</sup> I. 2, 14, 5; D. 28, 5, 13.

(8); the total being 16. A. got  $3/16$ , B.  $5/16$ , and C.  $8/16$ . Further, there might be fractions of the *uncia*, if that was desirable.

It might also happen that the shares were specified for same *heredes* and not for others. In that case, these took the difference between the allotted shares and 12, or the next higher multiple of 12. The following two cases will illustrate:

(a) A., 3 *uncia*; B., 5 *uncia*; and C. C. will take 4 *uncia* ( $1/3$ ).

(b) A., 5 *uncia*; B., 9 *uncia*; and C. In this case 24 is the minuend and C. will take 10 *uncia* ( $5/12$ ).

(2) The will must dispose of the entire estate. The rule was phrased as follows: "No one can be partly testate and partly intestate." Its effect was to exclude the heirs on intestacy in the cases just discussed, in which the total number of *uncia* were less or more than 12, or a *heres* had no allotment of *uncia*, or one of several *heredes* with specified allotments predeceased the testator. The difference may be seen in the case of a soldier's will, which left 6 *uncia* to A., 1 to B., and said nothing of the rest. In that case, the 5 *uncia* undisposed of would go to his heirs as though he were intestate.<sup>20</sup>

Complications arose when the will attempted to allot specific pieces of property to several *heredes*, as in the following illustrations:

(a) A. is to be *heres* as to the Tullian property. If no other *heres* is mentioned, the qualification is disregarded.

(b) A. is to be *heres* as to the Tullian and B. as to the Sabine property. If the Tullian and the Sabine property constitute the whole estate, A. and B. are equal *co-heredes*, whatever may be the relative value of the properties. That means chiefly that they are jointly liable for the debts. When the estate is distributed, the *iudex* will give the Tullian estate to A., and the Sabine to B., which may be a very detrimental division to A. or to B., if there are many debts.<sup>21</sup>

<sup>20</sup> I. 2, 14, 5.

<sup>21</sup> D. 28, 5, 10; 28, 5, 11.

There are cases of *prælegata*, "pre-legacies," not essentially different from other legacies (*infra*, § 160); and that was particularly true if the two properties mentioned did not constitute the whole *hereditas*.

(c) A. is to be *heres* as to the Tullian property, and B. *heres* in the ordinary sense as to two-thirds. A. and B. are *heredes* as to the whole estate, in the proportion of 1 to 2, and A. is besides a legatee of the Tullian property.

### CONDITIONS IN THE APPOINTMENT OF A HERES

150. A *heres* could not be appointed, to begin his functions at a later date.

A condition might suspend the qualification of a *heres*; but, if it is impossible or immoral, the appointment is void.

Other conditions might make the appointment void, especially those against public policy.

It was assumed that the *heres* continued the person of the testator. Obviously, therefore, a provision like the following: "Let A. be *heres* one month after my death," is invalid. But the only effect would be that the time is disregarded and A. becomes *heres* at once.<sup>22</sup>

Logically the same ought to be the case, if A. is made *heres* upon a certain condition, and this condition has not been realized at the moment of the testator's death. However, this was not done, provided the condition was still realizable. If A. is appointed *heres* on condition of his being elected consul, the *hereditas* was really in suspense until his election or his death. During that time it was not, strictly speaking, a *hereditas iacens*, since the heir was willing enough to take; but, as he could not take until the condition was fulfilled, the *hereditas* was exposed to the dangers of that situation, until the courts spe-

<sup>22</sup> D. 28, 5, 34.



cially intervened to protect the future beneficiaries. The heir might be allowed to enter, subject to a duty to account for the property if the condition failed; or other interested parties might be permitted to enter on the same condition.<sup>23</sup>

If the condition was impossible, immoral, or illegal, it was disregarded.<sup>24</sup> What made a condition immoral is, of course, a matter of subjective determination. But impossibility is equally dependent on circumstances, and conditions which seemed impossible to the Romans, such as, "if he goes from Rome to Carthage in one day," are not impossible now. Again, the condition, "if he makes a monument for me in three days," was stricken out as impossible. And yet, while it is extremely difficult, performance in this case can easily be conceived of as a possibility. But, at all events, the impossibility must be at the time the will goes into effect. If it supervenes after the testator's death, the condition fails, as in following case: "Let A. be *heres*, if he frees his slave Stichus." Stichus dies after the testator's death. A. cannot qualify as *heres*.<sup>25</sup>

Again a *heres* once duly instituted cannot lose his rights. "Once an heir, always an heir." *Semel heres, semper heres*. A will reads: "Let A. be *heres* till three years after my death." A. is *heres*, without regard to the time. Or: "Let A. be *heres* until he leaves the city." There cannot be a condition subsequent proper—a resolute condition in the position of *heres*—and yet this last condition can be phrased negatively: "Provided he does not leave the city." In that case the heir is admitted, under bonds that he will surrender the estate if he disregards the prohibition.<sup>26</sup>

But, if certain conditions are disregarded, others are effective, and make the institution of a *heres* void. We have already noted such a case, when a condition originally possible becomes impossible after the testator's death. There were, however,

<sup>23</sup> D. 28, 5, 4.

<sup>24</sup> D. 28, 5, 46; 28, 7, 14.

<sup>25</sup> D. 9, 2, 23, 2.

<sup>26</sup> D. 28, 5, 89.

others. A. is made *heres*, if X., a third person, consents. The institution is void, because its validity must not be made to depend on the arbitrary will of another person. Similarly, the appointment of any one whom X. may select as *heres* is void for the same reason.<sup>27</sup>

Powers of appointment accordingly, in trust or otherwise, were not readily created at Roman law, and the effect sought to be gained could be achieved, if at all, by way of legacies or *fidei-commissa* (infra, § 167).

Again, a self-contradictory condition prevented the *heres* from taking at all. The only example given in the Digest is: "If Titius is *heres*, let Seius be; and if Seius is *heres*, let Titius be." Neither Titius nor Seius can be *heres*, for neither can show the performance of the condition. It does not sound like a real or a practical case, and it may be that it is an extreme example of an instance in which a condition is unenforceable, because it is unintelligible, though evidently the testator had something in mind which he did not succeed in expressing.<sup>28</sup>

Another condition which rendered the institution of *heres* void was the *conditio captatoria*. A. makes B. his *heres* on condition that B. makes A. his *heres*. At Rome this was regarded as grossly against public policy, because of the ease with which senile and ignorant testators could be imposed upon by means of it. The common law—indeed, the modern law generally—finds little to object to in them. The "mutual will" is a widespread custom, especially as between husband and wife. The special conditions of Roman society and the different rules in regard to testamentary capacity (infra, §§ 152, 154) rendered a condition of this type one that avoided the *hereditas* based upon it.

Something of the Roman attitude in respect to these matters may be learned by comparing this type of condition with conditions which violated public policy because of their immorality

<sup>27</sup> D. 28, 5, 32.

<sup>28</sup> D. 28, 7, 16.

or illegality. In the case of the latter, the immoral or illegal character was a reproach only to the testator, and not to the *heres*. The condition was therefore void, and treated as non-existent. Otherwise the *heres* would be the one penalized. In the case of a *conditio captatoria*, the *heres* is involved in the reprehensible practice and justly forfeits the *hereditas* which depends upon it.<sup>29</sup>

### SUBSTITUTIONS

151. The appointment of a second *heres*, on the condition that the first failed to qualify, was called substitution (*substitutio vulgaris*).

Mutual substitution of several *heredes* might avoid lapses.

The substitution of another *heres* for a minor child in the event of the child's death before majority was in effect making a will for the child (*substitutio pupillaris*).

Since a *heres* might decline to act for one reason or another, and the existence of an *heres* was indispensable for a valid will, it was an obvious precaution to provide for his refusal. A will would therefore be made as follows: "Let A. be *heres*. If he refuses, let B. be *heres*." This was technically called a *substitution*, and in the case mentioned a common substitution, *substitutio vulgaris*.<sup>30</sup>

Essentially, this is a sort of condition. B. takes on a double condition: First, that A. has been validly instituted; and, second, that he refuses. If A., therefore, predeceases the testator, or is incapable of taking, B. cannot be *heres*, for want of fulfilling the condition.

It was a common practice, when several *co-heredes* were named, to provide that they shall be mutually substituted for one another. As far as the actual share of the *heredes* was

<sup>29</sup> D. 28, 5, 72.

<sup>30</sup> I. 2, 15; D. 28, 6; C. 6, 26, 4.

concerned, this was unnecessary, since in any case, if one *heres* refused, his share increased the shares of the others; but for certain purposes it was important to distinguish between what was gained by right of survivorship (*ius adcrescendi*) and what was gained by direct inheritance (*ius hereditarium*).<sup>31</sup> It was possible in this way to avoid the incidence of certain laws (*infra*, § 158). If there were several *heredes* with different shares, any one might be specifically substituted to any other. As there might be burdensome conditions attached to one of the two, he might wish to accept one and refuse the other. This, apparently, could not be done. If he was *heres* at all, he was *heres* precisely as the will instituted him, and if, by the refusal of one *co-heres*, he became his substitute, he had only the alternative of accepting the *hereditas* in full or repudiating it entirely.<sup>32</sup>

A substitute to a substitute might be appointed; that is, A. might be *heres*, B. substituted if he refused, and C. if B. refused. C. would scarcely succeed, unless B. had become *heres* by A.'s refusal, and had then himself refused. Hence the death of either A. or B. would exclude C. But if A. and B. were *co-heredes*, and B. a substitute of A., as well with C., added as B.'s substitute, B. is really the substitute of A. as well, and will take if A. refuses, even though B. is incapacitated or dead.<sup>33</sup>

A very different type of substitution is that which is called *substitutio pupillaris* and *quasi pupillaris*, "substitution in case of a minor and incompetent." If the *heres* is a minor, it is possible that he may die before he is capable of making a will. The substitute did not succeed to the estate of the *paterfamilias* at all, but to the estate of the minor, which might be a wholly different thing in the number and quality of the property rights which composed it. In effect, therefore, the *paterfamilias* made a will for the minor, as well as for himself. This idea is a dif-

<sup>31</sup> C. 6, 26, 6; D. 28, 6, 24; I. 2, 15, 1.

<sup>32</sup> D. 28, 5, 59, 7; 28, 6, 23; 28, 6, 45, 1.

<sup>33</sup> D. 28, 6, 41, p4.

ferent one from that which underlies the common substitution, but was treated as a variant of it, and perhaps derived from it.<sup>34</sup>

It was also possible in this way to make a will for an adult *heres*, who might become insane. Substitution of this sort was called *quasi pupillary*, or exemplary, substitution, and was subject to almost the same rules.<sup>35</sup>

A special type of substitution, called *fidei-commissary* substitution, will be discussed under *fidei-commissa* (infra, § 167). It was this type which grew into a great institution during the Middle Ages, resembling the entails of the English law, and was abolished by most of the modern Continental Codes as a feudal abuse.

<sup>34</sup> I. 2, 16; D. 28, 6, 2.

<sup>35</sup> I. 2, 16, 1; C. 6, 26, 9.



## CHAPTER 23

TESTAMENTARY CAPACITY AND CLASSES OF HEIRS  
(*HEREDES*)

## Section

- 152. Capacity to Make a Will.
- 153. Special Forms of Incapacity.
- 154. Passive Testamentary Capacity.
- 155. Classes of *Heredes*.
- 156. *Necessarii*.
- 157. *Sui et Necessarii*.
- 158. *Extranei*—Lapses.

## CAPACITY TO MAKE A WILL

152. The capacity to make a will was a special privilege of full Roman citizens. Foreigners were excluded, and those citizens who had lost citizenship.

Some citizens were excluded as incapable. The most important groups were minors, incompetents, and persons made incapable as a punishment (*intestabiles*).

The common law knew both active and passive testamentary capacity. Minors could make no wills, and by statute corporations and religious bodies could not take under wills. But, in general, after wills of lands were permitted, the common law allowed a very large freedom in the persons who could make wills, or could take under them, as well as an almost unlimited range as to what might be disposed of under a will. In spite, however, of certain statements in cases which speak of general favor accorded wills, they were not specially encouraged at the common law. Technical rules were strictly enforced in interpreting them, and the maxim had considerable currency that the law made the best will.<sup>1</sup>

<sup>1</sup> For the history of English wills, and the numerous restrictions which originally existed both in the general law and under local cus-

At the Roman law, wills were obviously encouraged. It is, however, too much to say that there was any horror of intestacy, or that the latter situation was considered a particular misfortune.<sup>2</sup> The capacity to make a will (active testamentary capacity) and the capacity to take under one (passive testamentary capacity) were both restricted, and always thought of as a privilege, and, as we shall see, the range of testamentary disposition was much curtailed.

Of the persons who were *patresfamilias*, but were denied the capacity to make wills, we may list the following:

(1) *Pupilli*—minors below the age of puberty.

(2) Foreigners, who had not acquired the privilege by grant or treaty.

(3) Congenital deaf mutes.

(4) Insane persons. These could make a will during their lucid intervals, and any will made before their insanity was valid.

(5) In the older law, women could make no wills. This was soon qualified by the rule that she might make one with her guardian's (tutor's) consent, and the tutor's consent in the early Empire became a mere formality.

(6) *Intestabiles*. This was a special group, who had been deprived of the privilege as an incident of conviction for crime, or as a penalty for entering into some degraded type of employment. The *intestabilis* was equally incapable of being a witness to a will. It became a typical example of civic humiliation, and "*intestabilis esto*" became a common curse as well as a taunt.

(7) Captives. A Roman, while prisoner of a foreign foe, was a slave, and could make no will. If he had made one be-

toms, cf. 2 Pollock & Maitland, *History of English Law* (2d Ed.) 314 et seq.; 3 Holdsworth, *History of English Law*, 535 et seq.

<sup>2</sup> This "horror of intestacy" is frequently mentioned by English writers. Buckland, *Text-Book*, 361; Maine, *Ancient Law* (Pollock's Ed.) c. vii, pp. 237, 238; Gross, *Medieval Law of Intestacy*, 18 *Harvard Law Review*, 120, 121.

fore his capture, that would be valid, if he died in captivity, and, if he returned, it became in full force by the right of *postliminium* (supra, § 39).

(8) Freedmen did not have *libera testamenti factio*, except as a special privilege given them by the emperor. But the limitation imposed upon them was rather as to the way they disposed of their property than as to the will itself. In effect a *legitim* was created (infra, § 165) in favor of the patron as well as of the freedman's children.<sup>3</sup>

It was the rule that the active testamentary capacity must exist both at the time the will was made and when it went into effect, viz. at the death of the testator. But a distinction was made between the capacity to make a will and the capacity to have one. An insane person could not make a will, but he could have one. Therefore, if he became insane after making his will, he died testate; the will being valid. What he really lost by his insanity was the power to change his will.<sup>4</sup>

A captive, on the other hand, had really lost his power to have one, and, if he died in captivity, he would have died intestate, except for a specific statute—a *lex Cornelia*, probably of Sulla's time.<sup>5</sup>

For most of the other cases the rule held. They had capacity neither to make nor to have a will. That would be obviously the case with the *intestabilis*.<sup>6</sup>

### SPECIAL FORMS OF INCAPACITY

153. Insanity was required to be more than bodily feebleness. Undue influence was less frequently invoked at Roman law to avoid a will than at common law. The institution of a *legitim* rendered it less necessary.

<sup>3</sup> D. 28, 1; I. 2, 10, 2, 11; 2, 12; C. 6, 22.

<sup>4</sup> D. 28, 1, 2, 4; 28, 1, 6, 1.

<sup>5</sup> D. 49, 15, 18; Paul, Sentences, 3, 4, 8; I. 2, 12, 5.

<sup>6</sup> D. 28, 1, 18, 1; 28, 1, 26.

Bequests were against public policy, if improperly solicited or in favor of certain persons.

The usual grounds on which testamentary capacity is challenged at the common law are mental incompetence and undue influence. At Roman law, also, insanity deprived a *paterfamilias* of his power to make a valid will, but this matter was never so fully worked out as in our system.<sup>7</sup> The instances given are careful to provide that insanity must not be confounded with bodily debility in any form, but the word used is regularly the strong term, "madness"—*furor*.<sup>8</sup> The refinements of our statutes and decisions on the subject seem to have been unknown.

Of the other common reason for invalidating wills at the present day, "undue influence," we hear practically nothing. Apparently no statute or decision could prevent a doting old man or a person of feeble will from making an improper person his *heres*, or legatee. Of course, fraud or duress was a reason for rescission, but the common and modern instances of undue influence fall far short of either. The picture given in Latin and Greek literature shows no lack of cases of wills made in favor of designing and unworthy persons under circumstances which would have made them open to the gravest suspicions. Legacy hunting was a well-known and much reprehended abuse. A "captatory" institution of a *heres* (supra, § 150) was void, as against public policy; but this was, of course, only one form which the abuse might take. But the Roman law automatically limited the mischief created by undue influence on testators, by withdrawing a certain part of the estate from his disposition. This matter of the *legitim* will be considered later. It was intended to make sure that the family, the natural recipients of the testator's bounty, shall not be wholly passed over for any one, whether by proper or improper practices. And, as it is this deprivation of a testator's

<sup>7</sup> D. 28, 1, 17.

<sup>8</sup> C. 6, 22, 3.

natural heirs which is the basis of the claim of undue influence, there was little occasion for invalidating wills because of undue influence.

There was also a certain check on the practice by the fact that, under statutes of Augustus, the *lex Iulia* and the *lex Papia-Poppæa*, unmarried persons (men over twenty-five, women over twenty) and childless persons could take nothing under a will, or only half of what was given them. Again, the conduct or character of certain persons, named as heirs or legataries, might make them unworthy to receive the bequest. They would, however, be deprived of their share without invalidating the will. These restrictions were abolished under the Christian emperors, at which time the *legitim* was extended.<sup>9</sup>

## PASSIVE TESTAMENTARY CAPACITY

154. Certain persons could not be *heredes*:

- (a) Persons imperfectly identified;
- (b) Corporate bodies;
- (c) Some or all *intestabiles*.

Capacity to witness a will was denied to *intestabiles*, and in general granted to all who had passive testamentary capacity.

Besides the class of childless and unmarried persons just mentioned,<sup>10</sup> the older law at first excluded women altogether from those who could take under a will, when the testator belonged to the richest class of citizens (*lex Voconia*, of 168 B. C.). The special class of half-freedmen, the Junian Latins, were also incapable, and the *dediticii*, the class of penalized freedmen. Both classes ceased to exist under Justinian.<sup>11</sup>

But later legislation introduced a new group of 'persons disqualified to be *heredes*, or only partially so qualified; these were

<sup>9</sup> G. 2, 111; Ulpian, *Regulæ*, 16, 3.

<sup>10</sup> G. 2, 274.

<sup>11</sup> C. 7, 5; 7, 6.



illegitimate children. They and their mother together might be *heredes* only as to one *uncia* (supra, § 149), and the mother alone only to half an *uncia*. But, if there were no legitimate children or wife living, they were permitted a larger share, which might in some cases amount to the entire estate.<sup>12</sup>

The same rule, it may be said, in passing, applied to legacies given to such children.

A larger class of persons disqualified was that which was called *incertæ personæ*, persons who were so vaguely described that no definite persons or definite existing classes were covered by the description. The Institutes, speaking of legatees, who were subject to the same rules of qualification, gives as instances wills made in favor of "the first consul to take office after my death," or "whoever may become my daughter's husband." Ulpian cites as an example, "whoever may first come to my funeral." Gaius, however, points out that, if it were phrased, "whichever of my relatives comes first to my funeral," the description is certain as to class, and the institution is a valid one.<sup>13</sup>

Another group of persons who have no *testamenti factio passiva*, may not be *heredes*, is the group of corporate bodies.<sup>14</sup> Municipalities often were granted the privilege by special charter, but it was not until a constitution of the emperor Leo, in 469 A. D., that all city communities were made capable of being *heredes*. Legacies, however, were apparently permitted, and the permission either confirmed or extended by Nerva and Hadrian.<sup>15</sup>

Of other corporations, the *collegia*, for example (supra, § 99), it is certain that they could not be made *heredes*, except by special privilege granted by law or imperial decree. But since the time of Marcus they could take by legacy or trust, provided

<sup>12</sup> C. 5, 27, 8.

<sup>13</sup> I. 2, 20, 25; G. 2, 238.

<sup>14</sup> C. 6, 24, 12.

<sup>15</sup> C. 1, 8, 1.

they were the specially licensed corporations described in Chapter 12 (*supra*, § 99). If they were not so licensed, they were incapable of receiving legacies, although, as we shall see, the prætor might give equitable remedies here.

Just as corporations could not take, so the gods were not capable of being made *heredes*. An exception was made for certain specified foreign gods, chief among whom was Diana of the Ephesians and the Moon-Goddess of Carthage.<sup>16</sup> Evidently ancient practice was in these cases too well established to be met with anything but recognition. Under the Christian emperors, the Church entire, then even individual churches, might take, and making Christ one's *heres* was by a constitution of Justinian to be valid for the local church of the district in which the testator resided.<sup>17</sup>

The principles governing the incapacity of corporations at Roman law were, therefore, quite different from those movements which led to the enactment of the English statutes of mortmain. These represented the jealousy which the landowners felt against the accumulation of property by corporations—chiefly religious corporations—which generally withdrew this property permanently from the possible acquisition of natural persons. Secondly, the readiness with which natural heirs might be disregarded by a testator anxious to secure religious approbation seemed to open the door to undue influence. Nothing of this sort apparently underlay the Roman restrictions, but rather the formal difficulties of entry on an inheritance by a collective entity like a corporation, composed of a membership which might change radically between the making of the will and the testator's death.

Posthumous children were first excluded, and finally quite unqualifiedly given the capacity of taking under a will. This included posthumous children of any person, not merely of the

<sup>16</sup> Ulpian, *Regulæ* 22, 6, mentions Jupiter Tarpeius among these gods. In general, however, they were foreign.

<sup>17</sup> C. 1, 2, 1; 1, 2, 15; 1, 2, 25.

testator, provided that they were *en ventre sa mère* at the time of the will's going into effect.<sup>18</sup>

It will be noted that slaves, whether of the testator or of another, could be made *heredes*, and had therefore the *testamenti factio passiva*. The slave of another person than the testator needed his master's permission in order to take the inheritance, and, when he took it, title, of course, accrued to his master.<sup>19</sup>

A number of further disqualifications were made from time to time as penalties. We are not sure that *intestabiles*, in general, were incapable of being *heredes*; but heretics, apostates, or children of condemned traitors were, and condemnation for crime might carry this special disability by express decree.<sup>20</sup>

Capacity to be witness to a will depended on special rules. *Intestabiles* were excluded. Indeed, this may be what the term originally implied. Slaves and women were excluded, though they could be *heredes*. And immature children and madmen—who, of course, could be *heredes*—were incapable of being witnesses for obvious reasons. But the rules were extended further. It was held to be an impropriety for a *heres* or any of his family to be witnesses, and it was finally made illegal. The effect of violating the rule was apparently that the signature and seal of the *heres* witness was disregarded, and, if this brought the number of witnesses below the required seven, the will was imperfectly executed, and at strict law ineffective. However, a legatee might be a witness, whatever his share of the estate was.

<sup>18</sup> G. 2, 242; C. 6, 24, 8.

<sup>19</sup> I. 2, 14, 1; D. 28, 5, 31.

<sup>20</sup> I. 2, 10, 10; G. 2, 108.

## CLASSES OF HEREDES

155. Certain persons must either be inherited or disinherited by name. Others might be disinherited in a general provision.

Three classes of *heredes* existed, with varying liabilities under a will: *Necessarii*, *sui*, and *extranei*.

Just as there were some groups who could not be made *heredes*, so there were others who must be *heredes*, or, if they were disinherited, must be expressly mentioned. These were primarily the *sui*, a class of heirs who, in the ancient system, were part of the agnatic family (infra, § 171), and were treated as though their expectancy were vested. They were all those who were under the *patria potestas* of the testator at the time of his death. The rule was that a testator must either make the *sui* his *heredes*, or expressly disinherit them. It was further qualified that, if they were his sons, he must mention each one by name. All the other *sui* might be gathered into a general clause, somewhat as follows: "All other persons are disinherited"—*Ceteri exheredes sunt*. The prætor enlarged the class of those who must be disinherited by name to all descendants, and allowed women to claim if there was no *ceteri* clause.<sup>21</sup>

Later, posthumous children were admitted as capable of being instituted or disinherited. They were, however, excluded by a *ceteri* clause.

The effect of failure to mention a son or descendant, preterition, was that the whole will was void. If there was no *ceteri* clause, those *sui* who would have been excluded by it were entitled to claim the share they would have had on intestacy, or, in some cases, part of that share.

Justinian abolished the *ceteri* clause. All *sui* had to be expressly made *heredes*, or in every case disinherited by name or description. Failure to do so made the will void in the case of

<sup>21</sup> G. 2, 127; Ulpian, *Regulæ*, 22, 20-23; I. 2, 13, 1.

the *sui*, and in the case of the *postumi*, and one or two other exceptional cases, allowed the disregarded heirs to come in for their shares as though the *paterfamilias* had been intestate.<sup>22</sup>

Classification of possible *heredes* served a different purpose than that of merely determining how they might be disinherited. A very important classification distinguished three groups: (1) *Necessarii*; (2) *sui et necessarii*; and (3) *extranei*.

### SAME—*NECESSARII*

156. The *necessarii* were slaves of the testator. They could not refuse to act, and were compelled to assume the obligations of the estate.

They might obtain the privilege of "separation," in order to keep subsequently acquired property free from the claims of the creditors of the estate.

The *necessarii* were slaves of the testator. If a *necessarius* was instituted *heres*, he had no choice but to accept. He became at once the owner of all the property of the estate and the debtor of all its debts. It follows as a matter of course that he became free by the testament, although he was not specifically emancipated.<sup>23</sup>

It is not likely that a solvent testator would institute his slave as *heres*. But, if he was insolvent, there was a great inducement to do so. Most freemen would refuse the inheritance, lest their own property would be involved in the estate's insolvency, as might well be the case (*supra*, § 146). The family *sacra* might then be completely abandoned, for want of any person to carry them on. This consideration outweighed in Roman eyes the fact that in this way the estate was still further depleted by withdrawing one slave from it. But the creditors were not heard to complain under these circumstances.

But the slave was allowed one privilege. He was free from

<sup>22</sup> I. 2, 13, p4.

<sup>23</sup> I. 2, 19, 1; G. 2, 153.



the moment the will took effect, and, being free, he might acquire property. Since it would take some time, until the insolvent estate was settled and its parts sold for the benefit of creditors, these acquisitions would be swallowed up to his manifest detriment. He was therefore permitted the privilege of "separation." He might keep his acquisitions apart from the property of the estate, and thereby save it from the creditors of the testator.<sup>24</sup>

Obviously, if the estate was insolvent, only one slave could be made *heres*. If several were named, only the first took. It was this obligation, which the *heres* assumed against his will, which constituted the *obligatio ex necessitate* mentioned by Modestinus (supra, § 43).

#### SAME—SUI ET NECESSarii

157. *Heredes* who became *sui iuris* at the death of the testator were *heredes* unless they refused. They had the *ius abstinendi*, the privilege of declining. Creditors of a solvent estate might ask for the privilege of "separation," to prevent it from becoming insolvent by being accepted by an insolvent *heres* (marshaling).

*Heredes sui* were later granted the right of deliberating, which properly belonged to the third class.

These were all those who became *sui iuris* by the death of the testator; i. e., sons, and grandsons whose fathers had predeceased them.<sup>25</sup> If named, the will took effect at once, and unless they refused they assumed all the legal responsibilities of *heredes*. They had, however, the *ius abstinendi*, the right of refusal, which they could exercise, provided they had not meddled with the *hereditas*.<sup>26</sup> If for one reason or another they

<sup>24</sup> D. 42, 6, 1, 18.

<sup>25</sup> I. 2, 19, 2.

<sup>26</sup> D. 29, 2, 71, 9.

were compelled to deal with it in some way, particularly if they were acting in the interests of the inheritance, they must unequivocally indicate that they do not mean to act as *heredes*. Otherwise, any indication by word or act of their assent was irrevocable. A refusal, however, was not so under the law of Justinian. The *suus heres* might change his mind any time within three years, if the goods had not been sold.<sup>27</sup>

But, if he accepted, the creditors might have a reasonable ground for complaint. Just as a solvent *heres* might become insolvent by being compelled to assume an insolvent estate, so a perfectly solvent estate may be rendered inadequate by being accepted by a heavily indebted *heres*. If this was apprehended, the creditors might demand a severance, *separatio*, as the *heres necessarius* did, and have the debts marshaled, so that the creditors of the *paterfamilias* might be satisfied first out of the fund which properly belonged to them.<sup>28</sup>

The granting of such a right of marshaling, however, was subject to several conditions. The creditors must not be guilty of laches. Five years, for example, was too long a delay. Secondly, they must not have attorned to the *heres* in any way. Any transaction with him in relation to the debts of the estate—the acceptance of a stipulation, the substitution of a new contract, or an accord and satisfaction—concluded them as to the right to insist on a severance of the property. And, finally, the rights of purchasers from the *heres* were protected. These would be preferred to the creditors.

Again, the creditors might have reason to desire a prompt determination of the matter. In the case of a *heres suus*, there was at first little that they could do, except by promptly bringing actions, either on the debt or to secure the *separatio*. But, as the *heres* might at any time refuse, the creditors could by special process summon him before the *prætor* to compel him to make up his mind whether he would keep the inheritance or not.

<sup>27</sup> D. 28, 8, 8; C. 6, 31, 6.

<sup>28</sup> D. 42, 6, 1; C. 7, 72, 10.

This was especially the case in the third class of *heredes*, the *extranei*, who in such a case might apply for a time for deliberation, the *spatium deliberandi*, which would vary with the circumstances.

This *spatium deliberandi* was later extended to the *sui heredes* as well.<sup>29</sup>

### SAME—EXTRANEI—LAPSES

158. All other persons were not *heredes*, unless they accepted the estate. Words or acts constituted acceptance.

An *extraneus* might limit his liability to the property he received from the estate, if he asked for that privilege and made an *inventory*. Otherwise he still had the time for deliberating; but, if it elapsed, his privileges were gone.

The general rule was that, if one *heres* failed to qualify, the other *heredes* took his share. By several statutes (*leges caducariæ*) some lapsed shares escheated. Justinian revised the law of lapses and finally abolished it.

All persons named as *heredes* who were neither slaves nor children *in potestate* of the testator, were *heredes extranei*.<sup>30</sup> They had to perform some definite act to indicate their acceptance, and until they did so the *hereditas* was *iacens* (supra, § 146). Indeed, a formal acceptance of the inheritance had at one time been absolutely necessary to establish the position of *heres* for any class—the *cretio*. That had become obsolete, and any indication of acceptance by acts as *heres* (*pro herede gestio*), or by words or general conduct (*nuda voluntas*), was enough. The difference, then, between a *heres suus* and a *heres extraneus* was the existence of a presumption. It was presumed that the *heres*

<sup>29</sup> D. 28, 8.

<sup>30</sup> I. 2, 19, 3; D. 32, 38, 3; 50, 12, 14.

*sui* would accept, unless he indicated that he would not; no such presumption existed in the case of the *extraneus*.

In the earlier law, as we have seen, an error in judgment was fatal. If the estate turned out to be less valuable than the *heredes* had supposed, they could not escape its liabilities. An exception was made for minors (less than twenty-five years), and later for soldiers. Justinian finally allowed a very similar privilege to all *heredes*, and in doing so really changed the character of the Roman *heres*. The latter could readily become liable only to the extent of the property actually received; that is to say, he was really merely the executor of the estate, and not the successor of the testator.

But, in order to avail himself of this privilege, he must have an inventory drawn up of all the property of the estate (*beneficium inventarii*). In that case, however, he could not likewise demand his right of deliberating (*spatium deliberandi*). The inventory must be begun within one month after he learned that the inheritance had devolved on him, and must be completed within three months.<sup>31</sup>

If the *heres* failed to make an inventory, he still had the *spatium deliberandi*; but, if he let this time elapse without action, he forfeited his claim to the fourth to which he was entitled under the *lex Falcidia* (infra, § 164), and he owed personally all the debts, as well as the legacies, of the inheritance.

This applied to both *heredes sui* as well as *extranei*. Indeed, the difference between the two classes of *heredes* was very slight under Justinian, and for most purposes the classes were fused.

*Lapsed Shares*

A great many of the cases, in which for one reason or another the institution of a *heres* was void, were treated as *non scripta*; i. e., disregarded. These shares fell to the *heredes* whose institution was valid, as the nature of the Roman will demanded (supra, § 149). Some of these cases have already been mentioned.

But in regard to others a special rule was introduced by stat-

<sup>31</sup> C. 6, 30, 22.

utes, particularly the *leges Papia* and *Julia*, so often referred to (supra, § 153). These statutes, and the rules derived from them, were the Statutes of Lapses (*leges caduciariæ*), and until the time of Justinian they played a large part in the Roman law of wills.<sup>32</sup> They dealt with the cases in which the institution was void because the *heres* predeceased the testator, or because, at the death of the testator, the *heres* did not have passive testamentary capacity, refused the inheritance, or died before he had entered upon it. The shares so vacated did not accrue to the other *heredes* by survivorship (*iure accrescendi*).

The following rules were established:

(1) Survivorship was retained for ascendants or descendants up to three generations (*ius antiquum*).

(2) In default of ascendant or descendant *heredes*, other *heredes* who had children took the lapsed shares.

(3) In default of the latter, the public treasury—later the imperial *fiscus*—claimed the interest created by the lapse.

Justinian abolished the *leges caduciariæ* in 534 A. D. for the second edition of his Code (cf. supra, § 34).<sup>33</sup>

<sup>32</sup> Ulpian, *Regulæ*, 14-18.

<sup>33</sup> C. 6, 51.



## CHAPTER 24

## LEGACIES

## Section

- 159. Manumissions by Will.
- 160. Nature and Kinds of Legacies.
- 161. Validity and Vesting of Legacies.
- 162. Interpretation of Legacies.
- 163. Ademption.
- 164. Abatement of Legacies—The *Lex Falcidia*.
- 165. The Legitim.
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- 167. *Fidei-Commissa*—Trusts.
- 168. Family Trusts.
- 169. Revocation of Wills.
- 170. Classes of Invalid Wills.

## MANUMISSIONS BY WILL

159. Slaves were frequently manumitted in the will of their master. In interpreting the effect of such manumissions, every presumption was allowed in favor of freedom (*favor libertatis*).

The rights of creditors were protected, both against manumissions by will and manumissions during the testator's lifetime.

We have so far been discussing only the position of the *heres*. It cannot be too often repeated that the word is not the same as the English "heir," and particularly not the same as the word "heir" in the popular sense, which, as a rule, denotes any beneficiary under a will. The *heres* or *heredes* continued the personality of the testator and absorbed his estate into theirs. In doing so they assumed his liabilities—a result which would seem to a Roman a matter of course.<sup>1</sup>

<sup>1</sup> This was true in early English law as well. Jenks, *Short History of English Law*, p. 63, quoting Glanvil, vii. 8.

But they assumed, not merely the liabilities which existed during the testator's lifetime, but also new ones which he created by means of the very document which appointed the *heres*, the testament. As has been stated, the primary and essential purpose of the testament was to make just this appointment; but an almost equally ancient function was the manumission of slaves and the selection of guardians for *impuberes* (children under fourteen).

As far as the manumission of slaves was concerned, the manumission took effect at the same time as the will. It did not depend on any act of the *heres*. Of course, if no *heres* took, or was disqualified, so that the will did not go into effect at all, the manumission was equally ineffective. The situation could easily be cured by an act of the prætor, who might permit the freed slave himself to take the inheritance.

If a condition was attached, the slave's status was in suspense until the condition was fulfilled. He was still a slave technically, but actually he was a *statu liber*, and was treated as belonging to a separate group. Conditions on manumission were dealt with more liberally than those imposed on inheritance or legacies, because of what came to be called the *favor libertatis*, the rule that every interpretation should, if possible, result in freedom, rather than slavery.<sup>2</sup>

As an example, a supervening impossibility may be taken (*supra*, § 150). A will reads: "When Titius reaches the age of thirty, let Stichus be free, and let my *heres* give him the Alban farm as a legacy." Titius dies before he reaches the age of thirty. Stichus is free, but the legacy fails by supervening impossibility. Again a provision, "Let Stichus be free, if he renders a certain account to my *heres*," is to be interpreted as a grant of unconditional liberty to the slave, with the obligation of rendering an account, for which the *heres* may bring an action.<sup>3</sup>

But the *favor libertatis* was not pressed so far as to interfere

<sup>2</sup> D. 50, 17, 179.

<sup>3</sup> D. 40, 4, 16.

with the claims of legitimate creditors. If the estate was insolvent, or would be insolvent if the slaves freed by will were withdrawn from it, the manumission was simply void, and the creditors could treat the slaves manumitted as belonging to the estate. The same rule applied to manumissions made by a man in his lifetime, which were in fraud of creditors.<sup>4</sup> The legal methods by which creditors could protect themselves were the same as in the case of ordinary alienations to their prejudice (*supra*, § 52).

## NATURE AND KINDS OF LEGACIES

160. Legacies were of two kinds:

(a) Those which vested title in the legatee as soon as the *heres* qualified under the will (*per vindicationem*).

(b) Those which merely gave the legatèe an action *in personam* against the *heres* (*per damnationem*).

This action (*actio legati*) was one of strict law.

Under Justinian all kinds of legacies were merged, and created both actions *in rem* and *in personam*.

Manumission, then, one of the oldest features of wills, was independent of any act of the *heres*, except his existence, and an old form of legacy, the *legatum per vindicationem*, had the same effect. If the will went into operation at all, title at once vested in the legatee. He could vindicate the *res* in the hands of any person who had it, and could treat it as any other property which he had acquired. But, as it was possible that the legatee himself might not accept, it was finally ruled that his title dated from the will, but became divested if he later on refused the legacy. To be sure, in case of a conditional legacy, the title could not vest until the condition was fulfilled. In the meantime, title was

<sup>4</sup> I. 1, 6, pr.; 1, 6, 3; D. 40, 9, 10; 40, 9, 16, 2.

in the *heres*, who could use the thing bequeathed, but could not alienate or encumber it.

Only Quiritary property could be left by this type of legacy.<sup>5</sup>

A legacy, *legatum*, might, however, be merely an instruction to the *heres* to give a specified person a certain specified piece of property belonging to the estate. In that case the legacy did not convey title to this property to the legatary, but merely created an obligation in his favor against the *heres* for this thing. This obligation was, however, the basis of an action of strict law (cf. *supra*, § 56) the *actio legati*, that is, the legacy created as unmistakable and unqualified a legal duty as though the *heres* had himself promised the *res* by a stipulation.

The forms of legacy which gave merely a right *in personam* against the *heres* were the forms *per damnationem* and *sinendi modo*.<sup>6</sup> A fourth form, *per præceptionem*, was of much disputed nature. The legacy *per damnationem* was the ordinary type in which most bequests were made.

If a legacy failed for any reason, the estate was thereby increased, and the profit went to the *heres*. But that was not the case if the bequest was made to joint legatees. A joint legacy resulted both when a *res* was given to A. and B. in words to that effect, and when the same *res* was separately given first to A. and then to B. in the same will. The rules governing the two types of legacy were strictly applied here. When the legacy was *per vindicationem*, the failure of one of the joint legatees to take did not affect the title of the other. And, when the legacy was *per damnationem*, the *heres* owed only the legacy which actually remained effective. He would therefore benefit to some extent by a failure of one part of the joint bequest.

Justinian put all legacies in the same class, and practically treated them as though they all created rights *in rem* to the thing bequeathed. He might enforce this right, either by vindication, by a personal action *ex testamento*, or by a hypothecary action to impress a mortgage, or the entire part of the estate subject to

<sup>5</sup> G. 2, 193.

<sup>6</sup> G. 2, 204.

the legacy. If the *heres* was insolvent, so that a mortgage against him might be ineffective, the legatees might claim the same *bonorum separatio* as the creditors (*supra*, § 157). Indeed, they were creditors in much the same way. The right to claim double damages if a legatee's claim was resisted was practically abolished by Justinian.<sup>7</sup>

### VALIDITY AND VESTING OF LEGACIES

161. The rules for validity are in general the same as those governing inheritances.

In most cases great liberality of interpretation was shown as to time or conditions of vesting. A certain number of conditions were disregarded as against public policy.

If there was a condition subsequent, or a specific purpose of the legacy indicated, security might be required of the legatee (*cautio Muciana*).

All who could be *heredes*, and a few others, could be legatees.

The legacy vested (*dies cedit*) on death of testator or happening of condition precedent. It became actionable (*dies venit*) when the *heres* entered.

A certain number of conditions were disregarded as against public policy.

In general, it may be said that the same rules governed the validity of legacy as those which governed the institution of a *heres*. Impossible or immoral conditions were disregarded, but conditions were slightly more strictly construed in one or two respects. A legacy made to a son could be made to depend upon a condition wholly out of his power to carry out, but a *heres* could not be thus conditionally instituted.

In other respects great liberality of interpretation was shown. Two frequently cited rules were used: *Falsa demonstratio non*

<sup>7</sup> C. 6, 43, 1.



*nocet; falsa causa non nocet*. "A misdescription does not affect a legacy," and "a wrong reason does not affect a legacy."<sup>8</sup> If the *res* bequeathed is definite and known, the *heres* owes it, and any description of it is surplusage. Again, when the testator recites the motives of his gift, the truth or falsity of the statement is irrelevant. The bequest is valid in any case.

Except for improper or impossible conditions, there was no limitation. A legacy could begin at a certain time, and be valid for a certain time. A legacy could be granted under a condition subsequent, or under a negative condition, the fulfillment of which could not be certainly known till the legatee's death. And these conditions could be purely external, or depend upon the legatee himself (potestative conditions).

As examples of conditions which were disregarded, because they seemed against public policy, the following may be cited:

"To my wife, on condition that she shall not remarry."<sup>9</sup>

"To A., if he does not permit his daughter to marry B.," or "provided he permits his daughter to marry B."<sup>10</sup>

"To A., if he does not alienate a specified slave," or "provided he alienates a specified slave."<sup>11</sup>

But the condition, "To A., if he remains permanently in the town of X.," was valid.<sup>12</sup>

Even a gift over to the emperor or *fiscus* would not validate conditions of this type.

An attempt was made to distinguish "penal" conditions from ordinary conditions. The very common condition in modern wills against contests was not specially considered. Legacies were *ipso facto* forfeited, if the will was contested on any ground except formal defects. Otherwise the distinction between "penal" and ordinary conditions might well be found in

<sup>8</sup> I. 2, 20, 29; 2, 20, 30; 2, 20, 31.

<sup>9</sup> C. 6, 40, 1.

<sup>10</sup> I. 2, 20, 36.

<sup>11</sup> I. 2, 20, 36.

<sup>12</sup> C. 6, 46, 3.

the purpose which the condition attempted to fulfil. If the attempt was made—as in the cases cited—to secure a result which was disapproved of, although it was not an actual crime, the condition was penal, and was disregarded.<sup>13</sup>

Again, instead of a condition, a specific duty may be imposed upon the legatee as to the way the legacy might be used (*modus*).

In all these instances the legatee took when the condition happened, if it was a condition precedent. If the condition was a negative one, or a condition subsequent (resolutive), he might take at once, provided he gave security that the legacy would be restored, if the condition occurred which divested him. Similarly, in a legacy *sub modo*, he could not claim it from the *heres* unless he provided security that the testator's wishes as to its application would be carried out, even though the *heres* had no interest or concern in the particular application which constituted the *modus*.<sup>14</sup>

This security was instituted by Quintus Mucius Scævola (90 B. C.), and was called *cautio Muciana*. It continued to be enforced under that name by the *Corpus Iuris* of Justinian and perhaps was somewhat more widely extended by the *Corpus*.<sup>15</sup>

The rules of personal qualification applied equally to *heres* and legatee. In general, it may be said that any one who could be *heres* could be a legatee. But the reverse was not quite true, as has already been stated. Women were permitted to take legacies, even when they were excluded from inheritances, by the *lex Voconia* (supra, § 154), and corporations were allowed by statute to take to a limited extent, although they, too, could not be *heredes*.

A legacy was due, or became a valid right, either at the death of the testator or the occurrence of a condition precedent. This vesting of the property or the accruing of an obligation

<sup>13</sup> Theophilus, Inst. 2, 20. Cf. the note in the case before the Cour de Cassation, reported Dalloz. P. 46, 1, 5.

<sup>14</sup> D. 32, 19.

<sup>15</sup> D. 35, 1, 72.

determined the content and nature of the interests involved. What the legatary got was discovered by examining what the legacy actually carried with it on the day when it became vested. To express the fact that the legacy had become vested, the technical expression *dies cedit* was used.

But the legacy, though vested, is not yet so completely the property of the legatary that he may bring an action for it. To express the fact that such a right of action accrues, the term *dies venit* was used. In general, it may be said that *dies veniens* occurred when, and not until, the *heres* has actually entered upon the inheritance. But, of course, if the legacy was conditional, the *heres* may enter before the condition happens. In that case, *dies veniens* will occur simultaneously with *dies cedens*; i. e., the legacy will vest and the bequest become actionable at the same moment.<sup>16</sup>

## INTERPRETATION OF LEGACIES

162. The *heres* in the ordinary legacy was obligated to acquire the bequeathed article, if the estate did not possess it.

The *regula Catoniana*, to the effect that legacies were to be considered as of the date of making the will, did not apply to the previous case, or to conditional legacies.

In interpreting specific legacies, the assumed intention of the testator governed.

It is evident that, in one type of legacy, a bequest of something which the testator did not own was none the less valid. The *heres* would be under an obligation to acquire it and give it to the legatee, or to give him the value of the thing. But, if it was already the legatee's property, the bequest was void.

<sup>16</sup> D. 36, 2; C. 6, 53.

Suppose, however, that when the will was made the thing bequeathed was the property of the legatee, but that he afterwards sold it before the testator's death. Since the will speaks ordinarily only from the testator's death, the legacy ought logically to be valid, but a difficulty was raised by the existence of an ancient rule, the *regula Catoniana*, by which the validity of a great many legacies was determined by the date of making a will. It was held that the *regula* did not apply to such a case. On the other hand, if A. bequeathed to B. the property of C., and B. himself bought the property from C. before A.'s death, the *heres* is none the less obligated to pay B. the value of it. To this the exception was made that B. must have bought the thing, and not acquired it gratuitously.<sup>17</sup>

There were other cases in which the *regula Catoniana* did not apply. Above all, it could not very well apply to conditional legacies, since the period in which they vested was determined by the will itself. But it did apply if the legacy would have been void as against public policy when the will was made, and the defect could not be cured by anything that happened later. A bequest of the materials of a house was void, because it was against public policy to tear down structures (*supra*, § 123). And the bequest was none the less void because, before the testator died, the house might have been legitimately torn down, and the materials thus might have regained their independence.<sup>18</sup>

As might be expected, the Digest is full of decisions in regard to specific legacies. It is always a question, when some object or class of objects is mentioned, to be sure what the *res* was which was to become the legatee's property. A mention of wine, jewels, utensils, first raised the question of whether what the estate actually contained came within those categories. Secondly, if an indefinite quantity had been mentioned, from which of several groups was it to be taken? Again, the legatee may have been left his choice of some things, or

<sup>17</sup> D. 34, 7.

<sup>18</sup> D. 34, 7, 4; 30, 41, 2.

else the forgiveness of a debt, or a right of user over certain property. It was also a question of what was to be included when the legacy was a collective group, a flock of sheep, etc.<sup>19</sup>

The general rule is frequently cited. In all cases the intention of the testator is to govern as far as it can be made out in the will. He may have misnamed the thing bequeathed. He may have contradicted himself. But, if there is any chance of discovering from the document what he meant the legatee to have, that will be assigned to him. Rules of ordinary practice, of course, were resorted to when, as must often have been the case, it was not really possible to be sure of the testator's meaning.<sup>20</sup>

### ADEMPTION

163. Legacies were revoked either by express terms or by implication—ademption.

Legacies were further lost if the legatee and testator got into a serious quarrel, if the legatee was ungrateful or became unworthy. The rules for unworthiness (*indignitas*) covered most moral delinquencies, especially in relation to the testator.

Gifts made by way of legacy were subject to a type of revocation called "ademption," which was wholly independent of the revocation or failure of the will. The testator, in bequeathing a *res* to B., might indicate conditions under which it would not go to B., but either to C. or to the estate. As these conditions might occur before the testator's death, the bequest would never have an opportunity of becoming effective. Further, a legacy was adeemed, if the thing bequeathed was alienated by the testator in his lifetime, and, if he afterwards repurchased it, the legacy was not revived. The legacy was also

<sup>19</sup> D. book 33; D. 34, 1; 34, 2; 34, 3.

<sup>20</sup> As an example, cf. the instances given in D. 33, 6.



revoked if its value had been given to the legatee by the testator *inter vivos*.<sup>21</sup>

A very special case—quite out of keeping with our system—also furnished an example of ademption. If the testator and the legatee got into a serious quarrel, so that their feelings became hostile and remained so, the legacy was impliedly revoked. However, the legacy revived if they became reconciled. This seems at first blush somewhat in contradiction with the rule *falsa causa non nocet* (supra, § 161), and we may wonder just how it was applied; but it has its analogies in the law governing gifts *inter vivos*.<sup>22</sup>

But not only might a legacy be revoked, but it might be forfeited, because the legatary was deemed unworthy to receive it. An obvious class of unworthy persons were those who had by neglect or malice caused the testator's death. When the case of *Riggs v. Palmer* occurred in New York, courts were confronted with the inequity of permitting a parricide to succeed to the estate, under a will of the father he had murdered.<sup>23</sup> The suggested solutions were many, and in some cases rather complicated.<sup>24</sup> The Roman-law rule of unworthiness presented a simple and readily applied disposition of the matter.

Under this head might fall many cases which are dealt with at common law as illustrations of undue influence, although the usual examples of *indignitas*, unworthiness, are of a different sort. A legatee, who attacked the will on any grounds except its formal legality, lost his legacy. The common clause in modern wills, which provides for a forfeiture if the will is contested, was therefore the ordinary rule in case of a legatee. Again, a legatee that had spoken ill of the testator lost his bequest. Particularly any act in fraud of the law induced

<sup>21</sup> I. 2, 21.

<sup>22</sup> D. 34, 4, 3, 11; 34, 4, 4.

<sup>23</sup> 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819.

<sup>24</sup> Ames, J. B., Can a Murderer Acquire Title and Keep It? Lectures on Legal History, 310-322.

forfeiture. That was particularly the case in secret trusts, which were strongly against the policy of the Roman system. If a legatee had bound himself to transfer his bequest to another person, or use it for another's benefit, he forfeited his legacy.<sup>25</sup>

But in most cases the disposition of the forfeited legacy was quite different from that of the adeemed one. The latter fell to the *hereditas*; the former in most cases became the property of the *fiscus*.<sup>26</sup>

### ABATEMENT OF LEGACIES—THE LEX FALCIDIA

164. To prevent the exhaustion of the *hereditas* by legacies, a statute, called the *lex Falcidia*, provided that a *heres* was entitled to one-fourth of what he would have received, had there been no legacies.

Legacies were abated proportionately to secure this quarter.

The Falcidian quarter could be waived under Justinian.

The position of a *heres*, even with the privileges which later legislation granted to him (supra, §§ 156–158), was not without its perils. If, besides the estate itself, which had burdens as well as benefits, he found himself subject to unlimited legacies, there would have been few who would consent to act as *heredes*. By the *lex Falcidia* of 40 B. C. the position of a *heres* was much improved. He was guaranteed at least a quarter of the *hereditas*.<sup>27</sup> If there were several *heredes*, and special legacies charged against each of them, each must be permitted to retain at least a quarter of such share as he would have had, had there been no legacies.<sup>28</sup>

<sup>25</sup> D. 39, 9.

<sup>26</sup> C. 7, 62, 22; D. 5, 2, 8, 14; 49, 14, 13, 9.

<sup>27</sup> I. 2, 22; D. 35, 2; G. 2, 224–227.

<sup>28</sup> I. 2, 22, 1; D. 35, 2, 77.

In making the calculation of what the *hereditas* really was, funeral expenses and debts were deducted, and freed slaves were disregarded. The Falcidian quarter was then estimated on the value of the remaining estate as of the date of the testator's death. If the estate was at that moment worth one hundred aurei, and one hundred aurei had been given in legacies, the *heres* might take his quarter and prorate the seventy-five among the legatees. Even if the value had much increased before the heir entered, the increase belonged to him, and he owed the legatees only seventy-five. The converse held true. If the will provided for legacies of seventy-five aurei out of an estate worth one hundred, the seventy-five were due, even though the entire value of the estate had after the testator's death shrunk to seventy-five.<sup>29</sup>

The rule that specific legacies did not abate was not applied here. If A. had left B. a slave worth one hundred hs., and the Falcidian quarter demanded that B.'s share be reduced, B. must forfeit his legacy or refund the difference. But the bequest of a slave with instruction to free him would not be reduced, and the same rule applied when the testator by legacy forgave a debt to his debtor.

A testator might provide that, in reducing legacies in order to give the *heres* his quarter, certain legacies only should be affected, and, if this could be done, his wishes would be carried out. But, if he required that the *heres* should not keep his quarter, that was void, even if the *heres* consented. In this respect the rule was changed by Justinian, and the *heres* allowed to waive his privilege under the Falcidian law.<sup>30</sup>

Justinian further deprived the *heres* of this privilege, if he failed to make his inventory.

<sup>29</sup> I. 2, 22, 2; 2, 22, 3; D. 35, 2, 1, 19.

<sup>30</sup> N. 1, 2, 2.

## THE LEGITIM

165. A certain portion of the estate was withdrawn from testamentary disposition and allowed the immediate family of the testator.

If this portion had not been reserved, the omitted beneficiary sued by the *querela inofficiosi testamenti*—"plaint of the undutiful will." The effect was generally to avoid the will.

The *querela* was barred by acquiescence or by advances.

If something had been left, but not enough, an action lay for the difference (*actio in supplementum*). This did not avoid the will, but simply gave the claimant what was due him.

It was possible that the *querela* would lie against one *heres* and not against another. Partial intestacy then resulted.

Justinian modified these rules:

The *querela* simply gave claimants the balance due them and did not avoid the will.

The reserved portion (*portio legitima*) was, in some cases, half the estate.

Fourteen grounds of disinheritance were allowed, most of them proceeding on the theory of unworthiness.

The *heres* was not the only person who might be adversely affected by the existence of excessive legacies. The law recognized that a man's blood relations were natural claimants on his bounty, and, if they were disinherited in favor of strangers, they had a just cause of complaint. But their complaint was just only if they were not themselves unworthy, or had not been so undutiful that disinheritance was a deserved penalty.<sup>31</sup>

The action to enforce the claim of persons improperly disinherited was called the *querela inofficiosi testamenti*. It might

<sup>31</sup> I. 2, 18; D. 5, 2; C. 3, 28.

be brought by descendants, ascendants, and in some cases by brothers and sisters. The pretext advanced was that the absence of natural affection showed the testator to be insane; but this was not always maintained, since the will was not necessarily void. Each claimant was allowed one-quarter of what he would have had on intestacy. This quarter was the *portio legitima*, and its name survives in the legitim of modern continental systems.<sup>32</sup>

If the *querela* was sustained, the will was generally void. Manumissions and legacies failed, and the claimant received his whole share on intestacy, and not merely one-fourth of it. But, if the *querela* failed, the complainant forfeited whatever he might otherwise take under the will, which, as in cases of unworthiness (*supra*, §§ 153, 154), went to the *fiscus*.

In determining whether the claimant had actually received his share, it became usual to include, not only what he received under the will, but anything which he may have received by gift from the testator, provided it was clear that such gift was meant as an advancement. That would be a matter of course in the case of a donation *mortis causa*, and in the case of a donation *inter vivos* evidence might establish the fact that it was intended to be an advancement.

The *querela* would fail if there had been an acquiescence, express or implied, in the terms of the will. If the claimant had bought part of the property left, or hired it, or paid any

<sup>32</sup> The action was available in the case of an heir who had been overlooked, rather than disinherited. The latter group, "pretermitted heirs," have similar rights in many common-law jurisdictions, but the law in these jurisdictions merely gives such heirs the parts they would have been entitled to, and does not avoid the will. Massachusetts seems to have been the first to enact such a statute, in 1851. A revised form of this statute, or of a later Missouri statute, has served as a model for similar laws in some twenty states.

At Rome, the action seems to date back to late Republican times. A case is mentioned of the time of Pompey (Valerius Maximus, 7, 7), and two cases are discussed by the younger Pliny in the time of Trajan (Epistulæ, 5, 1; 6, 33).



claim established by the will, or accepted a legacy, he had acquiesced. And, of course, he might in explicit terms acquiesce or acknowledge the title of the *heres*.

The claimant, who, by establishing the *querela*, became *heres* on intestacy (infra, §§ 171–173), has an immediate right to the *res* belonging to the estate, which, like other *heredes* (supra, § 146), he may recover by proceeding *in rem*.<sup>33</sup>

If the claimant had not been wholly disregarded, but had received a bequest which he claimed to be inadequate, the result was quite different. It was perfectly possible that the testator had meant him to have his proper share, but had been mistaken as to the size of the estate he would leave. Indeed, it was customary to provide explicitly for this contingency by instructing the *heres* to pay the person entitled to a *legitim* (legitimatory) the full share. Justinian ruled that such a provision would be implied in every case.<sup>34</sup>

The action in such a case was not the *querela*, but the *actio in supplementum*. If it was successful it did not, under Justinian's legislation, avoid the will, but merely gave the legitimatory a claim against the *heres* for the balance due him. It was consequently much less effective than the *querela*.

But the effect of the *querela* itself was somewhat changed by later practice. It was somehow possible that, if there were several *heredes*, the *querela* might be maintained against some, and not against others. That is most clearly indicated, if a brother or sister claimed on the only ground which allowed a claim on their part, to wit, that they had been passed over in favor of persons of scandalous life. Only one of *heredes* might turn out to be of this class. The *querela*, then, although successful, avoided the will only in part, the claimant getting his share on intestacy, and getting it unincumbered, but the unimpeachable *heredes* remained, and all manumissions were valid. An attempt was made to show that this did not violate the rule that a *paterfamilias* could

<sup>33</sup> I. 2, 18, pr.; D. 5, 2, 2.

<sup>34</sup> C. 3, 28, 30; 3, 28, 36, pr.; C. Th. 2, 19, 4.

not be partly testate and partly intestate, but it was not very successful.<sup>35</sup>

There were other instances in which the *querela* might be maintained as against some *heredes* and not against others. The cases against the separate *heredes* might be tried in different courts, and one might fail and the other succeed. The result was the same as in the above case.

Justinian made a number of changes.<sup>36</sup> In the first place he changed the size of the *legitim*. If the testator had four children or less, the total amount which must be left to them was raised to a third; if he had more than four, to a half. Again the *querela* simply placed the claimants in the place of the *heres* or *heredes* unjustly preferred to them, which left the will intact, although the legitimataries are not officially called *heredes*. And, finally, he specified the grounds which would justify disinheritance, and so be a defense to the *querela*.

These grounds were fourteen in number, and were retained in most of the later civil-law systems, although the modern Codes did not re-enact them.<sup>37</sup> They may be enumerated as follows:

(a) Wrongs against the testator: A child who (1) assaulted his father; (2) held him up to public disgrace; (3) prosecuted him for any crime but treason; (4) informed against him to his damage; (5) attempted his life; (6) committed adultery with his father's wife; (7) prevented him from making a will; (8) refused to be his bail; (9) or to redeem him from captivity; (10) neglected him, if he became insane.

(b) Personal unworthiness: A son was justly passed over if (11) he engaged in witchcraft; (12) became an actor or gladiator, unless his parents were of that class; (13) became a heretic. A daughter might be disinherited (14) if she became a prostitute

<sup>35</sup> D. 5, 2, 15, 2; 5, 2, 24.

<sup>36</sup> N. 115.

<sup>37</sup> They are still enforced with some modifications in South Africa. R. W. Lee, *An Introduction to Roman Dutch Law* (2d Ed. 1925) p. 330, note 4.

or married a freedman without her parents' consent, unless they had themselves neglected to provide for her marriage.

### CODICILS

166. Codicils were not supplementary wills, like common-law codicils, but informal directions to the *heres*. They were primarily created to establish fiduciary duties on the *heres*, but their function was extended, and, in the later Empire, five witnesses were required.

Codicils and testamentary trusts (*fidei-commissa*) both originated in the time of Augustus, and to a certain extent simultaneously.<sup>38</sup> The term "codicil" is not quite the same at Roman law as at English law. In the latter system, it is merely a supplementary will, as formal as the will itself, and to all intents and purposes a new will, except that it does not revoke the old one completely.

But, at Roman law, a codicil was completely informal. For a long time it required no witnesses at all, until in 424 A. D. Theodosius ruled that five were necessary.<sup>39</sup> But codicils could be made before or after a will. Indeed, there need be no will at all. However, if codicils were confirmed by a later will, they really became part of the will itself, and could contain any provision which might be found in a will, except the institution or the disherison of *heredes*.

The original, and for a long time the sole, purpose of a codicil was to impose fiduciary duties on a *heres*, whether he was such under a will or *ab intestato*. The duties were exclusively that of giving some interest in the estate to a specified person. Since no formality was required, even letters would suffice, provided they were not merely promissory, but contained terms which showed an intention to make a present bequest.

<sup>38</sup> I. 2, 25; D. 29, 7; C. 6, 36.

<sup>39</sup> C. 6, 36, 8.

If a testator provided that no codicils were to be considered, except those signed or sealed by him, that provision affects only previous codicils, and not subsequent ones, since he cannot bind himself not to change his mind.

Until trusts and legacies were made practically equivalent by Justinian, a codicil, confirmed by a will before or after itself, was different from any other. Such a codicil could provide for manumissions and legacies. Any other codicil could merely create trusts.

A clause in a will, called the "codicillary clause," might provide that, if the will were invalid, it should be treated as a codicil. This would impose a trust on the *heres* who finally qualified to carry out the terms of the invalid will.<sup>40</sup>

### SAME-FIDEI-COMMISSA—TRUSTS

167. With the introduction of codicils, instructions to the *heres* as to disposition of the estate, *fidei-commissa*, became legally binding. From the beginning these were cognizable only under the extraordinary procedure.

To prevent a *heres* from refusing an inheritance burdened with these obligations, two statutes were passed:

*Senatus consultum Trebellianum*, which attempted to vest the title in the beneficiary and relieve the *heres* by equitable defenses.

*Senatus consultum Pegasianum*, which gave the *heres* a fourth, like the Falcidian quarter.

Justinian combined the two under the name *Trebellianum*.

*Fidei-commissa*, while very much like Anglo-American trusts, are not quite identical with them.

<sup>40</sup> D. 29, 7, 1.

These have been frequently mentioned in what has just been said. Originally, private instruction to a future *heres* at most bound his conscience, but imposed no legal duty on him. When codicils were made valid, these private instructions—*fidei-commissa*—were valid duties, and the *heres* could be compelled to carry them out.<sup>41</sup>

It is highly likely that these trusts came into existence simply because it was so easy to make them, as in the first cases in which they were enforced which are mentioned in the Institutes of Justinian. But it soon became obvious that many persons who were disqualified as legatees could in this way receive most of the benefits of a legacy. *Fidei-commissa* became extremely popular. They were never cognizable in the ordinary courts, but by magistrates especially delegated by the emperor, and finally a special prætor, the *prætor fidei-commissarius*, who was appointed to take charge of them.<sup>42</sup>

Their informality, their unlimited application, multiplied trusts so rapidly that special legislation was quickly called for. It became common to leave the entire *hereditas* in trust, the *heres* being required to make it over completely to the beneficiary. Literally, this would make the *heres* liable for all the debts, while depriving him of all the benefits. An elaborate system was devised, whereby the *heres* could protect himself. But this was quite cumbersome, and he must often have chosen to protect himself by the simple expedient of refusing the inheritance, which avoided the will completely.

To prevent this, the *senatus consultum Trebellianum* of 56 A. D. was passed, which attempted, as the Statute of Uses did in England so long after, to vest the estate completely in the beneficial owner. He received the whole property, with its benefits and burdens. To be sure, his actions were *utiles*, and the *heres* was protected only by equitable defenses; but the protection was complete, if the *heres* chose to use it.<sup>43</sup>

<sup>41</sup> Ulpian, *Regulæ*, 25, 1; I. 2, 23.

<sup>42</sup> G. 2, 274, 275, 278, 285; D. 32, 11, pr.

<sup>43</sup> I. 2, 23, 4; D. 31, 1, 2; G. 2, 253.



This was evidently not enough. The power of destroying the equity, by repudiating the inheritance, was frequently exercised by the *heres*. The *senatus consultum Pegasianum* of 73 A. D. sought to improve matters by allowing the *heres* the quarter interest which the Falcidian law gave him in the case of legacies (supra, § 164). This was the first step in equating *fidei-commissa* and legacies, an equating which was never fully carried out, except in trusts of individual *res*. As far as trusts of a whole estate, or a fractional part of it, were concerned, Justinian combined the two *senatus consulta*, giving the name "Trebellian" to his revised law and ruling, as in the case of the Falcidian quarter, that it might be specifically forbidden in the will.<sup>44</sup>

The great resemblance of these *fidei-commissa* to the English trust has often been adverted to. In both, the legal title and the beneficial interest in the same thing, or *res*, are divided. The beneficiary has only a personal action to compel the trustee to carry out the trust purpose. In Latin documents relating to English trusts, the term *fidei-commissum* is regularly used.

But the differences between the two institutions are apparent enough. The Roman trust was purely testamentary. It could not be made *inter vivos*. The trustee, or *heres*, might refuse to enter, and the trust would be wiped out. In English law, it is elementary that a trust will not be allowed to fail for lack of a trustee. And while the trustee *heres* was given a substantial interest in the estate by the Pegasianian quarter, he never had the power which English law gives a trustee of making a good title against the beneficiary in favor of a *bona fide* purchaser.

<sup>44</sup> I. 2, 23, 5; D. 36, 1; C. 6, 49.

## SAME—FAMILY TRUSTS

168. Attempts to found a family were connected with cult of the dead.

By *fidei-commissa*, the property could be kept intact in a man's descendants. In spite of imperial restriction, family trusts were enforced, in which instructions were given to transmit the property to lineal descendants.

By a Novel of Justinian this was limited to four generations.

The "family trust" was the form in which entails in medieval times framed themselves. As "*fidei-commissary* substitutions," they became very unpopular, and have been abolished in nearly all modern states.

One use of the *fidei-commissum* was destined to have far-reaching consequences. The desire to found a family was, in Mediterranean communities, unmistakably connected with the cult of the dead. In the East, it was customary enough to establish a family corporation, fully organized, keeping the property intact, and devoting a certain portion of the revenues to the maintenance of family rites. This, rather than any fear of excessive splitting of the estate, seems to have been the primary motive in the creation of "family trusts."

Before the *fidei-commissa*, alienation of property could be prevented only by means of usufructs (supra, § 141). A. could make B. his *heres*, and give to C., D., E., and F. successive usufructs in the estate. But all these persons must be existing, or at least conceived, at the time. A legacy or an inheritance to any one else would be to a *persona incerta* (supra, § 154), and therefore void.

Now, trusts, at first, could be made to *personæ incertæ*. Perpetual trusts, therefore, were possible. A. might make B. his

*heres*, under a trust to hand the estate to B.'s unborn son at his (B.'s) death, and so on indefinitely. An elaborate will of this sort of the year 108 A. D. has actually been preserved in an inscription. With these trusts, there was, of course, an express or implied prohibition of alienation. Generally the beneficiaries were descendants, but provision might be made for failure of issue.

Hadrian forbade the granting of a *fidei-commissum* to an *incerta persona*.<sup>45</sup> But that did not prevent the practice arising of creating a *fidei-commissum* for the benefit of a family. It was impossible for A. to grant an estate to his son B. and attach to the grant a general prohibition of alienation. But it was possible, and it became quite common, for a grant to be made with an instruction to keep the property together for the benefit of all A.'s descendants. Such a *fidei-commissum* was said to be left to the family. It would automatically expire in the second generation, unless it was expressly provided that it was to extend further. It is often said that under no circumstances could it be perpetual, but there is no real proof of that.<sup>46</sup>

At any rate, a limit was ultimately set to them. In the 159th Novel, in considering the specific case of a certain Hierius, which had already lasted four generations, decided that the present holders were to be free of the trust, and that four generations should hereafter be the extreme limit for which such trust might be created.

Such "family trusts" were essentially "substitutions," since they provided that the *heres* was not only to carry out a fiduciary purpose—in this case a restrictive one—but that he was to transmit this fiduciary purpose to those who held under him.<sup>47</sup> The Trebellian quarter would readily be sacrificed by a *heres* who had also a beneficial life interest in the whole estate. It was as

<sup>45</sup> G. 2, 285.

<sup>46</sup> D. 31, 32.

<sup>47</sup> D. 31, 88, 15; 32, 38, 4; Paul Meyer, *Jur. Pap.* pp. 66–71.

fidei-commissary substitution that the family trust was commonly known to the civilians.

The institution of the family trust, *familiare fidei-commis-sum*, had only a limited importance at Roman law, particularly after the Novel just mentioned. It received a new impetus many centuries after, when the feudal nobility of Italy, Germany, France, Spain, and England sought a means of perpetuating their power by concentrating their estates permanently in the hands of a single holder. This single holder was apt to be the eldest son, since primogeniture was a widespread and firmly established custom, and the names *maioratus* (Spanish, *mayorazgo*) and *primogenitura* indicate that fact. In many countries the four-generation restriction was enforced, or attempted to be enforced, by the civilians; but it was generally decided that it was prima facie only, and that by express words family trusts might go beyond that. The royal authorities usually opposed them, but without real effect.<sup>48</sup>

It may be said that no institution was so completely unpopular. They symbolized all the rigidity and caste spirit of the feudal system, and one of the first acts of the French Revolution was to sweep away all "substitutions," by which particularly the fidei-commissary substitutions were aimed at. Most of the modern countries of Europe followed France in this, although in most of them the less offensive pupillary substitution (supra, § 151) was retained.<sup>49</sup>

In England the system of entails created by the Statute *De Donis Conditionalibus* performed the functions which the family trust fulfilled elsewhere. Entails were capable of being created *inter vivos*, as well as by will, and recent researches have indicated that here, too, the restriction to four generations was at least attempted. However, it was apparently abandoned, and

<sup>48</sup> Declareul, Mel. Gerardin, pp. 135-157; Costa, Storia, p. 561.

<sup>49</sup> Pertile, Storia del diritto italiano, iv, 151; Baldi, C., Manuale pratico di Diritto Civile, ii, pp. 182; Sanchez-Roman, Derecho Civil, vi, 2, 22.

entails became perpetual, until the practice of joining heir and tenant in tail in breaking the entail was judicially recognized in the fifteenth century.<sup>50</sup>

## REVOCATION OF WILLS

169. A will was revoked by a later will, by physical destruction, or by deliberate mutilation.

When *heredes* could be made for specific things, successive wills might be all valid, if they did not contradict each other. Otherwise, the destruction of a second will revived the first only if it was destroyed for that purpose.

Revocation was simplified by Justinian.

Since a testament is the "last" will of the deceased, it would normally follow that, if several wills are found, only the last will should be effective. Apparently that was the only way in which a will could at ancient law have been rescinded, and, if we remember the characteristics of the will *per æs et libram* and the will made in the *comitia calata* (supra, § 147), it necessarily follows that there could have been no other type of revocation for these wills.<sup>51</sup>

But, when even informal written wills were operative, it was important to know whether at the moment of decease the testator was still of the same mind as when he made the will. If a will was found to be torn, or the seals destroyed, or the institution of *heres* deleted, it was almost conclusive that the testator no longer wished the document to be regarded as his testament. Almost, but not quite. There was a chance that these things had happened accidentally. If that supposition was excluded by the facts, the will was disregarded, even though its contents were available in copies, and the prætor would give the property to

<sup>50</sup> Isambert, Rec. des anciennes lois françaises, 14, p. 204; 14, 81, 59.

<sup>51</sup> G. 2, 144, 151; Ulpian, Regulæ, 23, 2.



the heirs on intestacy, without regard to the *heredes* mentioned, *bonorum possessio contra tabulas* (infra, § 174).<sup>52</sup>

If the will so destroyed was the later of two wills, that did not of itself revive the earlier one. This result would be reached only if the destruction of the second was made with the intention of giving effect to the former one. In most cases, it must have been difficult or impossible to show what the intention was, and we must assume that destruction of a later will was at least *prima facie* evidence of an intent to revive the earlier one.

But, if the testator was mentally incompetent when he destroyed the will, at least the absence of intention is apparent enough. Similarly, if in a second will the *heres* is instituted under a condition which fails, the first will retains its validity.<sup>53</sup>

That a second will which in no way contradicted the previous will should be valid as a codicil was scarcely a likely situation. The fact that the institution of *heredes* was different was inevitably a contradiction. But when, during the Empire, a *heres* might be instituted *ex certa re*, two successive wills might easily be consistent with each other. It was enacted that if, expressly or impliedly, an intention to maintain the earlier will could be inferred, the *heres* in the second will took subject to a trust in favor of the beneficiaries of the first will.

The desire to make sure that a will duly made was still actually the will of the testator at the moment of his death led to the strange provision, enforced for a long time, that a will automatically expired at the end of ten years. Justinian abolished it, but provided a brief form of revocation in the case of such wills. They could be revoked by a declaration before three witnesses, or by publicly recording the revocation.<sup>54</sup>

<sup>52</sup> D. 38, 6, 1, 8; I. 2, 17.

<sup>53</sup> I. 2, 17, 4.

<sup>54</sup> C. 6, 23, 27, 2.

## CLASSES OF INVALID WILLS

170. Invalid wills were either illegal (*iniustum*), nugatory (*nullius momenti*), revoked (*ruptum*), ineffective (*irritum*), or undutiful (*inofficiosum*).

A will might fail for any one of several reasons:

(1) It might not be made in proper form. In that case it was called *iniustum*, or *non iure factum*.

(2) It might fail expressly to disinherit, or to appoint a *suus heres*. It was then also called *iniustum*, or *nullius momenti*, and was wholly void.

(3) It might be revoked by another will, or by the birth of a *suus heres* after the will. The will was then *ruptum*.

(4) It might fail because the *heres* failed to take, *testamentum irritum*, or because a condition which had been imposed had not been fulfilled.<sup>55</sup>

In all such cases, as well as in cases in which the will is set aside for fraud or incompetence, or because it violates natural affection, *inofficiosum*, there is in fact no will at all, and intestacy results. That there was a possibility of partial intestacy was generally denied, but, as we have seen, such a condition might easily enough take place (*supra*, § 165).

<sup>55</sup> D. 28, 3; C. 2, 17.

## CHAPTER 25

## INTESTATE SUCCESSION

## Section

- 171. Intestacy—Under the XII Tables.
- 172. Under the Prætorian System.
- 173. Under Imperial Legislation.
- 174. *Bonorum Possessio*.
- 175. *Collatio Bonorum*.

## INTESTACY—UNDER THE XII TABLES

171. Intestacy was relatively frequent and did not seem an abnormal situation.

There were three stages in its history: That of the XII Tables; that of the prætorian law; and that of the imperial law. The first, that of the XII Tables, distributed the property in the following order: (1) To the immediate family (*sui heredes*); i. e., the unemancipated children, who became *sui iuris* by the testator's death. (2) To the next agnate, the nearest kinsman, reckoned through males, who could trace his descent to a common ancestor with the intestate. (3) To the *gentiles*, those belonging to the same *gens*, generally determined by a tradition of common ancestry evidenced by a common family name.

It is impossible to deal with this branch of the subject otherwise than historically, since the changes finally established are intelligible only by comparison with the systems superseded.<sup>1</sup>

Three stages are discernible: (1) That of the XII Tables; (2) that of the prætorian law; (3) that of the imperial legislation. The general nature of the changes can also be easily recognized. Intestate succession was originally the privilege of a small group of males connected by kinship, and a kinship reckoned by quite artificial rules only through males—the agnatic family. The prætorian system gradually opened the succession

<sup>1</sup> I. 3, 1.

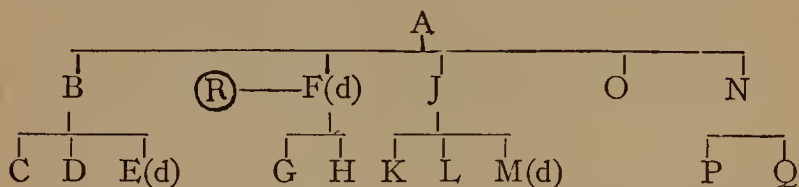
to kinsmen of all kinds, and the reforms of the emperors swept away, as far as possible, all artificial methods of determining relationship.<sup>2</sup>

It is frequently stated that, after wills were instituted, there was a "horror of intestacy" among the Romans, which made intestate succession of relatively rare occurrence. It may be doubted whether any convincing evidence can be found for that statement.<sup>3</sup> At all events, it is certain that intestacy was quite specifically recognized, and it may be remembered that intestacy occurred, not only when a man died without a will, but also when, for one reason or another, the *heres* refused to take, or the will was in some other way inoperative. It often took a year to determine whether intestacy existed or not, since a *heres extraneus* generally had a year to determine whether he would take or not.

### I. *Sui Heredes*

The order of succession under the XII Tables was, first, the *suius heres* (supra, § 157). A *suius heres* was one who became a *paterfamilias* by the death of the intestate.<sup>4</sup>

Suppose A. had the following line of descent (unless marked (d), the persons are all males):



In this table let us further assume that J and R have predeceased A, that O has been adopted into another family, and that N has been adopted by A. During A's lifetime B, C, D, E, K, L, M, N, P, and Q are all under his *potestas*. O is not, nor are G and H. F may not be, if she came under the *manus* of her husband (supra, § 40). But, at A's death, only B, K, L, and

<sup>2</sup> D. 5, 3, 1.

<sup>3</sup> Cf. supra, § 152, note 2; O. K. McMurray, *Liberty of Testation*; Wigmore, *Celebration Legal Essays* (1919) pp. 536-563.

<sup>4</sup> I. 3, 1, 1; G. 3, 2.

N, become *patresfamilium*. C, D, and E are now under the *potestas* of B; G and H never were under A's *potestas*. O ceased to be so before A's death, and P and Q are under the *potestas* of N. M, being a woman, is under guardianship, but is none the less *sua heres*, unless in some fashion she has foregone her rights.

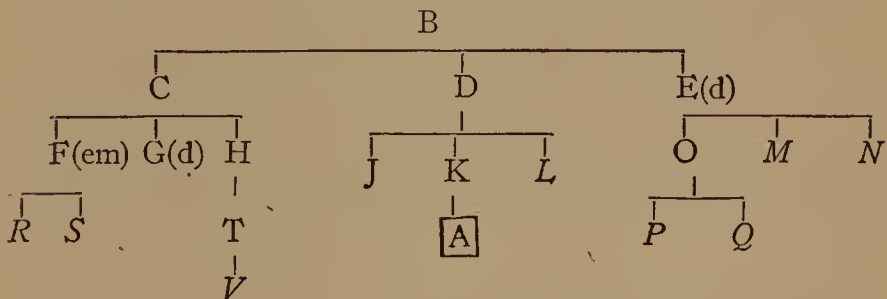
The succession will then be given to B, K, L, M, and N, but not in equal degrees. K, L, and M represent their deceased father, J, and will take only his share. This distribution is called *per stirpes*, and remained a permanent rule when the *heredes* were of different degrees. Accordingly, by this table, B and N will take one-third each; K, L, and M will take one-ninth each.

Blood relationship, therefore, plays a secondary part. G and H, grandsons of A, are not *heredes*, nor is O, his son; while N, who bears no blood relationship whatever, is treated as a full-fledged son.

If F had not come under the *manus* of her husband she would share with her brothers, but her children would not thereby be made *heredes*.

## II. Agnates

If there was no *suus heres*, the XII Tables gave the succession, or, at any rate, the actual control of the property, to the next agnate (*proximus agnatus*).<sup>5</sup> Who were the *agnati*? The simplest way of describing them is to say that they are all the persons who would be under the same *potestas* if their common ancestor were alive. The following table will illustrate:



<sup>5</sup> G. 3, 11; Ulpian, *Regulæ*, 26, 1; D. 50, 16, 195, 1; D. 28, 9, 2, 2; Cicero, *De Inventione*, 2, 50.



Let us assume that, at A's death, R, S, V, L, P, Q, M, and N are alive. All of them are descendants of B, but it is plain that not all of them would be under B's *potestas* if B were alive. R and S would not be, because they are children of an emancipated son; nor would P, Q, M, or N be, because they are under the *potestas* of their own father or grandfather. The *agnati*, therefore, are V and L. Of the two, L is the *proximus*. The simplest way of counting relationship is to count back to the common ancestor of L and A, or V and A, and down to A. By this method L is in the third degree, while V is in the seventh degree.

Women were originally not excluded from succession as agnates. But, after the Voconian law, only sisters were included in that class, although the result seems a rather violent application of the principle of that statute.

Further, again by judicial interpretation, a new class of *agnati* was created. A freedman's *agnati* were his patron and his patron's agnatic descendants, and apparently an emancipated son was treated like a freedman.

If L refused, the right of the agnates was gone. The succession was not offered to V; instead, the third group was called in, the *gentiles*.

### III. *Gentiles*

The *gentiles* were those who were members of the same *gens* as the testator.<sup>6</sup> In theory they were *agnati*, whose common ancestor was so far back that the descent could not be traced precisely. Actually they were members of an unorganized group, distinguished by bearing a common name, and, in some cases, of performing rites in common, the *sacra gentilicia*. It is not likely that the situation often arose in which the *gentiles* were called in, but there was the famous case of a Claudius Marcellus who died intestate. A controversy arose as to wheth-

<sup>6</sup> G. 3, 17; Cicero, *Topica*, 6, 29.

er all the Claudian *gentiles* should take, or merely the blood kinsmen of the man's father's patron.<sup>7</sup>

### SAME—UNDER THE PRÆTORIAN SYSTEM

172. In the prætor's court an intestate's property was distributed in the following order:

- (1) Children—including emancipated children, taking *per stirpes*.
- (2) *Legitimi*—the nearest agnatic kinsman, as under the XII Tables.
- (3) Cognates—the blood relatives, counting through males and females alike.
- (4) *Vir et uxor* (husband or wife).

The prætor modified the system by establishing four classes: (1) Children. (2) *Legitimi*. (3) Cognates. (4) Husband and wife.

#### I. Children<sup>8</sup>

If there were children, all took equally *per stirpes*. Emancipated children were included in this, but not children who had been adopted into another family, unless they had been emancipated by their adoptive parents before the intestate's death.

#### II. *Legitimi*<sup>9</sup>

If there were no children, the prætor called in the class of *legitimi*. These were principally the agnates, including the patron and his descendants. By the weight of authority only the *proximus agnatus* was entitled. If he refused, the next class was called to the succession.

#### III. Cognates<sup>10</sup>

The next class owed its entire existence to prætorian intervention. It included all connected by blood with the intestate,

<sup>7</sup> Cicero, De Oratore, 1, 39, 176.

<sup>8</sup> D. 37, 8, 1.

<sup>9</sup> G. 3, 28.

<sup>10</sup> D. 38, 8, 1, pr.

whether in the male or female line. It included, therefore, agnates as well, if the *proximus agnatus* had refused, and also the mother. In the case of cognates, there was a *successio graduum et ordinum*; that is, if the nearest cognate refused, the next took, and so on.

#### IV. *Husband and Wife (Vir et Uxor)*<sup>11</sup>

As a last class, if there were no cognates, the husband or wife was entitled to succeed.

This order was somewhat more involved than is here shown, if the intestate was an emancipated slave, or a son, emancipated by sale to a third person, who afterwards in turn emancipated him. However, these regulations were rare in application, and finally became obsolete.

### SAME—UNDER IMPERIAL LEGISLATION

173. The purpose of imperial statutes was to liberalize the system, especially as to the succession of a mother.

The final order of succession, under Justinian, was as follows:

- (1) Descendants.
- (2) Ascendants and brothers and sisters.
- (3) Half-brothers and half-sisters.
- (4) Relatives in order of proximity.
- (5) Husband or wife.

In the time of Hadrian, the *senatus consultum Tertullianum* was passed, which took the mother out of the prætorian class of *cognati*, and placed her somewhere between the classes of *liberi* and *legitimi*. Children, brothers of the whole blood, or a patron, excluded her. She took jointly with sisters of the whole blood, and she excluded all other agnates.<sup>12</sup>

In 178 A. D. the *senatus consultum Orphitianum* made a

<sup>11</sup> D. 38, 11, 1.

<sup>12</sup> D. 38, 17, 1, 3; I. 3, 3; C. 6, 56.

further change. Children succeeded their mother, and excluded their mother's agnates.<sup>13</sup>

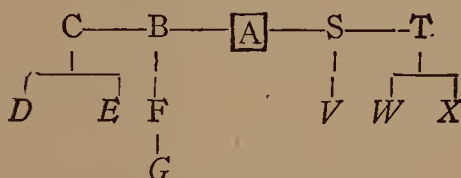
Further changes were made by successive emperors, until a complete revision was carried out by the Novels of Justinian. In the *Corpus Iuris*, however, a number of small reforms had been made. Grandchildren of a mother were included under the *senatus consultum Tertullianum*. *Successio graduum* (supra, § 172) was introduced in the case of agnates. Children of a freed slave were preferred to patrons.<sup>14</sup>

A complete remodeling of intestate succession was undertaken in the 118th and 127th Novels of 543 and 548 A. D. This system is the one which underlies most modern European systems, including that of the common law.

The old ideas, still apparent under the system of the *Corpus Iuris*, were completely discarded. The order was as follows:

(1) Descendants, taking *per stirpes*.

(2) Ascendants and brothers and sisters of the whole blood, probably taking *per capita*. If, however, the intestate had only paternal grandparents and a maternal grandfather, the latter took half. Nephews or nieces and their descendants represented the brother and sister from whom they were descended. The following table may be constructed:



If only the youngest in each line survived, D and E would take a fourth; similarly W and X; while G and V would take a fourth each. The succession was therefore *per stirpes*. But, if F was alive, all were in the same degree, and D, E, F, V, W, and X each received a sixth. In that case the succession was *per capita*.

<sup>13</sup> D. 38, 17, 1, 6; I. 3, 4; C. 6, 57.

<sup>14</sup> I. 3, 1; I. 3, 2; C. 6, 58.

(3) Brothers and sisters of the half blood.

(4) In default of any of the first three classes the nearest relatives took *per capita*. Proximity of relationship was determined in the method already indicated.

(5) Husband or wife.

In default of all these classes, the estate passed to the imperial treasury, or *fiscus*.

The similarity of this system to that of the common law in the matter of personal property is marked enough. In the case of real property, the striking differences between the Roman law of succession and the English law are obvious. Ascendants were very pointedly excluded, as well as brothers and sisters of the half blood. But in nearly all American states the system of succession, except for husband and wife, is very close to that of the Roman law, except that half-brothers are put on an equality with whole brothers. In all other respects, in the insistence on blood kinship without regard to sex, in the reckoning of degrees of relationship, American jurisdictions have reached a result almost precisely like that of the Novels, although in most cases they did not consciously follow them.

### BONORUM POSSESSIO

174. This was the prætorian title given to an equitable claimant of the estate, who, for one reason or another, was not the legal *heres*.

It might be in accordance with the terms of an actual will, *secundum tabulas*, or in spite of these terms, *contra tabulas*. It might be *sine re*, good except against the legal *heres*, or *cum re*, good even against him.

In the course of the previous pages, frequent reference has been made to the fact that both in testamentary and in intestate succession the prætor intervened, sometimes to uphold a will technically valid, sometimes to enforce a will which the persons



entitled to are disregarding, and sometimes to set aside the terms of the will, in whole or in part. Similarly, on intestacy, we have seen the statutory system of the civil law substantially modified by action of the courts.

Now, to create a real *heres*, a real successor of the person of the defunct, was beyond any magistrate's power. It was conceivable that a man might himself create a successor, or that the sovereign *populus* might create one for him, but hardly that an official could do so. The prætor, here, as in the case of titles to *res Mancipi*, contented himself with giving the substance. He could not make a man *heres*, who, as a matter of fact, was not so; but he could give him effective control of the actual property, the *bonorum possessio*.<sup>15</sup> In the case of intestacy, therefore, the classes created by him, especially the cognates, were never really *heredes* of the intestate, but were merely protected by him in the actual exercise of the powers of *heredes*, and when they appeared as litigants to claim the property of the estate he would not permit their title to be questioned collaterally.

When there was a will, and merely a question of some additional person to take under it, or when the will was informal, the *bonorum possessio* was *secundum tabulas*.<sup>16</sup> Where the provisions of a will were deliberately disregarded, it was *contra tabulas*,<sup>17</sup> as when a son had been improperly disinherited, or similar cases. But the *bonorum possessio* might be merely good against collateral attack, but not good when the actual *heres* claimed against the *bonorum possessor*. If that was the case, the *bonorum possessio* was said to be *sine re*. If the *possessor* was protected against the *heres*, or if he was himself the *heres* as well, his title was said to be *cum re*.<sup>18</sup>

An example may suffice: A leaves his property by an informal will to B, a stranger. The prætor will, on B's applica-

<sup>15</sup> D. 37, 1; I. 3, 9.

<sup>16</sup> D. 37, 11; C. 6, 11.

<sup>17</sup> D. 37, 4; C. 6, 12.

<sup>18</sup> Buckland, Text-Book, p. 391 et seq.; G. 3, 35-37; C. 3, 28, 25.

tion, give him *bonorum possessio*. If it later develops that A had had a son C, whom he has neglected to provide for or to disinherit, A is in fact intestate, and C is the *heres*. If C proceeds against B, he will win, and B's *bonorum possessio* was *sine re*.

Again, an omitted *suus heres* might at once claim *bonorum possessio contra tabulas*. This was obviously *cum re*, since he was himself as much *heres* as the others.

The actions by which the *heres* or possessor enforced his claim were two. He might bring a special interdict, called *quorum bonorum*, to be put in actual possession of the individual objects which formed parts of the inheritance.<sup>19</sup> That would, however, not help him for the debts owing to the estate, since possession could not literally be had of choses in action. But, besides the interdict, he might bring an action to be put in control of the entire inheritance, the *hereditatis petitio possessoria*.<sup>20</sup> It is to be noted that, if a *heres* claimed against a *bonorum possessor*, the petition was the only remedy, since, in an interdict, the prætorian title of *bonorum possessio* was a complete defense.

Under Justinian *bonorum possessio* and *hereditas* were in most cases fused. We may express that by saying that *bonorum possessio* was almost always *cum re*. All the old methods of acquiring the inheritance were available, as well as the two remedies just mentioned, and claimants entitled might elect among them.

### COLLATIO BONORUM

175. Emancipated children could not receive shares in the estate, unless they brought their later acquisitions into hotchpot (*collatio bonorum*). This type of *collatio* became practically obsolete under Justinian.

<sup>19</sup> I. 4, 15, 3; D. 43, 2; C. 8, 2.

<sup>20</sup> D. 5, 5.

*Heredes*, who received advances, were generally required to reckon them in determining their shares. This applied also to daughters whose dowries had been meant as advancements (*collatio dotis*).

The prætor had treated emancipated sons as *liberi* and allowed them *bonorum possessio*. In the older law, that gave them an enormous advantage over the unemancipated sons. The latter had no opportunity to acquire property independently; the former had large chances of doing so. To remedy this situation it was required that an emancipated son, who claimed his share of an estate, and his claim could ordinarily not be resisted, must bring into the estate all that he has independently acquired.<sup>21</sup>

However, *collatio bonorum* depended on two things: (1) That the emancipated son benefited by receiving *bonorum possessio*; and (2) that the *suus*, who was made *heres*, was prejudiced by that fact.

In the following two cases there was no *collatio*:

E, an emancipated son, receives a large legacy under a will. He asks for *bonorum possessio*, and upsets the will, thereby invalidating the legacies. If his share is not increased thereby, there will be no *collatio*.<sup>22</sup>

A, a *suus*, is made *heres* as to one-quarter, but the other three-quarters are given to outsiders. E, an emancipated son, breaks the will. A and E are now the *heredes* on intestacy, and A's share is twice what the will gave him. Here again E cannot be compelled to make *collatio*.<sup>23</sup>

In the later Empire, the growth of the *quasi castrense peculium* and the *bona adventicia* put the *filius-familias* in almost as good a position as the emancipated son, as far as acquisition of property was concerned. *Collatio* of the old type, therefore,

<sup>21</sup> D. 37, 6; C. 6, 20.

<sup>22</sup> D. 37, 6, 1, 4.

<sup>23</sup> D. 37, 6, 3, 6.

practically disappeared. In its place a new sort appeared, very closely resembling the hotchpot of the common-law system.

If the testator had made gifts to his *heredes* during his lifetime, they were *prima facie* treated as advancements on their future shares. If they wished to claim their inheritance, they were required to collate these gifts, either by actual contribution of the amount or by giving adequate security for it.<sup>24</sup>

Similarly a daughter, who had received a dowry, was in an advantageous position if she could keep her claim to a dowry and also insist on her share as *a.sua heres*. She had an actionable claim for this dowry against her husband, or her husband's estate, and this claim existed, whether the dowry had originally come from her father, *dos profecticia*, or from a stranger, *dos adventicia* (*supra*, § 38). This property, sometimes very considerable, had to be added to the estate, if she desired to share in it, and the term *collatio dotis* was applied to it.<sup>25</sup>

<sup>24</sup> C. 6, 20, 17; N. 18, 6.

<sup>25</sup> D. 37, 7; C. 6, 20.

## CHAPTER 26

## CRIMINAL LAW

## Section

- 176. Character of Roman Criminal Law and Procedure.
- 177. Penalties.
- 178. The Courts.
- 179. The Criminal Code.
- 180. The Underlying Principles.

CHARACTER OF ROMAN CRIMINAL LAW AND  
PROCEDURE

176. The basis of Roman criminal law was not different from that of Anglo-American criminal law.

Tort actions, being penal and not compensatory, the difference between criminal and delictual liability was not so great as in modern systems.

The characteristic of criminal procedure was that it created an *iudicium publicum*. Any citizen might prosecute, and not merely the injured person.

Roman public and criminal law has been much less studied than Roman private law, and in Anglo-Saxon countries there has been a persistent tradition that it is not very much worth studying. Reference has already been made to Kent's opinion (*supra*, Introd.). It was generally supposed that in the Roman theory, the state, as incorporated in the sovereign, was all-powerful, and that there was no guaranty of individual rights, such as men of English speech have embodied in their various charters and Bills of Rights.

Especially widespread is the belief that, whereas at common law every man was presumed to be innocent until proved guilty, the rule at Roman and civil law is the reverse, and every man is presumed guilty until he proves himself innocent. The existence of such a presumption at common law has, it must be



admitted, been rendered more than doubtful by Professor Thayer, but of the existence of a contrary presumption at Roman law there is no evidence at all. There is, to be sure, a rule against self-incrimination at the common law, which cannot be said to be of much value to the accused under existing American police methods. At Roman law no such rule existed. Presumptions as to guilt or innocence were not indulged in at all, and the extent to which inquisitorial methods were used depended, as always, on the character and temperament of the individual magistrate.

But the purpose of the following brief discussion is not to correct current misconceptions of the nature and enforcement of Roman criminal law. The civil and the criminal law were not kept as sharply separate in the Roman system, and those derived from it, as in our own. If we look at any of the modern Codes, the brief space accorded to the law of torts or civil wrongs is at once apparent. The generalized tort action provided for in these Codes—a development of the *actio legis Aquiliæ* (supra, § 51)—made a listing of specific torts unnecessary; but one might expect that decisions would supply a larger number of concrete applications than we find in fact. The reason is that reparation for wrongs which are also crimes—as most wrongs are—is granted as part of the criminal law, in the same proceeding as that which inflicted the penal sanction. The tort section of the Codes is consequently principally concerned with culpable negligence, which, in most instances, is not so grave as to constitute a crime.

The granting of reparation as part of a penalty was not a rule of Roman law, since, as has so often been noted, the theory of delictual action was not compensation, but was itself penal. Criminal action was a concurrent remedy to the injured person with delictual action, and in most cases the claimant was put to his election, and the pursuance of one excluded the other. This was not always so, and frequently criminal procedure was the only course open (supra, § 48).

In one respect criminal procedure resembled English pro-

cedure, and differed markedly from both Continental and American practice. The action was not brought by the state, but by a private person. It was, however, not confined, as in England, to the injured person, but might be brought by any citizen, and its name, *iudicium publicum*, was derived from the fact that any one of the *populus* might be the prosecutor.<sup>1</sup>

The underlying idea was the ancient one, that both delictual and criminal procedure were substitutes for the vengeance which an aggrieved person was entitled to take personally, and which it was the object of early law to persuade him not to take.<sup>2</sup>

It may be further noted that, if the person injured died as the result of his injury, it was not merely the privilege, but the actual duty, of his son to take legal vengeance. Failure to do so rendered him unworthy of inheriting. In other cases, public opinion probably enforced the duty of prosecution with equal force.<sup>3</sup>

## PENALTIES

177. Penalties in the ancient law were death, flogging, exile, and fines. The first two were abolished during the Republic for Roman citizens, but were reintroduced during the Empire.

Imprisonment was not a common penalty. During the Empire, deportation to an island was practically an equivalent thereof. Condemnation to forced labor in the mines was also introduced.

In the Empire, two classes of citizens were differentiated—an upper class, *honestiores*; and a lower class, *humiliores*. The former were exempt from degrading punishments.

<sup>1</sup> Thayer, J. B., A Preliminary Treatise on the Law of Evidence, Appendix B, p. 551; 5 Wigmore on Evidence (2d Ed.) § 2511.

<sup>2</sup> I. 4, 18, 1; D. 23, 2, 43, 10. There were certain limitations. Women, in general, could not be prosecutors, except in the cases referred to in the following note, D. 48, 2, 2, pr.

<sup>3</sup> D. 34, 9, 20; 34, 9, 21; 28, 5, 22.

In very ancient times, forms of punishment had been many. Death, flogging, exile, and property fines were employed, and the various forms of inflicting the death penalty depended on the rank or class of the offender. In later Republican days, death and flogging were, in practice, abolished for Roman citizens. Both were gradually reintroduced in the Empire.<sup>4</sup>

But imprisonment as a punishment was not employed at all. The famous Roman prison in the Forum, the *Carcer Mamertinus*, was a place for the temporary detention of criminals awaiting execution, not a real prison. However, during the Empire, it became customary to banish criminals to certain islands, chiefly in the Ægean. These islands, most of them long deserted as ordinary settlements, barren and small, were in fact prisons, and the unfortunate men condemned to them were not even supplied with ordinary necessities, but had to depend on their own resources or the kindness of friends for food and clothes.<sup>5</sup>

A new form of punishment was introduced by condemnation to state slavery in the mines or the galleys. A great deal of Roman economy depended on the vast mineral resources, generally owned by the state, but farmed out to individuals or quasi corporations, the *societates metallorum* (supra, § 100). The work was of such a nature that not even slaves had been found to perform it, unless they were chained. Condemnation *ad metalla*, "to the mines," was a form of capital punishment, and was employed for the gravest crimes and against the lowest type of criminals.<sup>6</sup>

In the Republic, a distinction was made between citizens and noncitizens. The former were privileged, and could claim immunity from any form of corporal punishment. When all the free inhabitants of the Empire became citizens, the privilege was lost. Instead another distinction had gradually established itself between the *honestiores* and the *humiliores*. The

<sup>4</sup> D. 48, 19, 7; 48, 19, 8.

<sup>5</sup> D. 38, 1, 3; 48, 19, 2, 1.

<sup>6</sup> D. 48, 19, 8, 7.

former were those who had held any magistracy, general or local, and who were, by that fact, of a sort of senatorial rank, even if it was a municipal senate. Their children were similarly treated, and apparently almost all people of a certain *census*—i. e., of a certain fortune indicated in the official *census*—were, or could easily become, members of this class. They retained the privilege of being exempt from flogging, and were in many cases merely exiled when the *humiliores* were executed, deported to an island, or condemned to the mines. But even the *honestiores* suffered the death penalty for some offenses, such as treason and murder.<sup>7</sup>

### THE COURTS

178. The original criminal court was the popular assembly. Later special courts, *quæstiones*, took their place. Under the Empire, magistrates were intrusted with criminal jurisdiction.

In general, crimes were defined by specific statutes.

The court in which crime was punished was a *iudicium publicum*. Originally, the *populus* itself was judge and jury, the magistrate being merely the president. In the later Republic, the system was introduced of having a select group of citizens from the highest ranks in the *census* act as a body of *iudices*. This body in a sense represented the *populus*, and its judgment was final. Every new criminal statute provided for a *quæstio*—that is, a permanent court made up from the panel of *iudices*—to try persons accused of violating the specific law.<sup>8</sup>

With the growth in the power of the Emperor, the *quæstio* procedure was abandoned. Although the *iudices* were taken from the people, they did not really perform the functions of

<sup>7</sup> C. 9, 18, 7, pr.; D. 48, 8, 3, 5; 2, 15, 18, 23.

<sup>8</sup> D. 1, 2, 2, 32; Cicero, pro Cluentio, 53, 147; Cicero, Brutus, 27, 106.

a jury at all. They were not a body sworn to find facts, but a method by which the sovereign maintained public order. When most sovereign powers were granted to the Emperor, he himself, or his delegates, determined guilt or innocence, and inflicted penalties. The senate was occasionally appointed as such delegate, but it was more usual to grant the function to some magistrate. In a sense, the right of appeal was inherent in the imperial system, since the magistrate's determination was on the exercise of a delegated power, for which he was answerable to the highest magistrate.<sup>9</sup>

The right of restraining acts committed in his presence was a fundamental characteristic of magisterial power. In such a case no definite penalty was prescribed. But, beginning with the last century of the Republic, the Roman criminal law was embodied in a series of general statutes, most of them the work of Sulla (*leges Corneliæ*) and of Augustus (*leges Iuliæ*). It was only as an infraction of the express or implied terms of a statute that an act was punishable as a crime. This definiteness was felt to be a guaranty against arbitrary action. In the conflict against the arbitrary power of officials representing absolute kings in later Europe, the Roman practice was cited in support of the vigorously defended maxim, "*nulla pœna sine lege*"—"no penalty must be imposed, except as determined precisely in advance by statute."<sup>10</sup>

### THE CRIMINAL CODES

179. A number of specific criminal statutes were very comprehensive, especially the *leges Corneliæ* (Sulla) and the *leges Iuliæ* (Cæsar and Augustus).

<sup>9</sup> Tacitus, *Annales*, 2, 27-32; Pliny, *Epistolæ*, 2, 11, 12; 3, 9; 4, 9; 6, 31, 4; D. 1, 12, 3; 5, 1, 12, 1.

<sup>10</sup> The phrase seems first to be found in Feuerbach, P. J., *Lehrbuch des peinlichen Rechtes*, § 20. But something very like it is cited in D. 50, 16, 1, 131. It is the continental equivalent for "due process of law."



A certain amount of discretionary jurisdiction was left to the magistrates.

The Institutes of Justinian give a list of important criminal statutes. In nearly every case the crime indicated is apparent from its title.

(1) The *lex Iulia* on treason.<sup>11</sup>

(2) The *lex Iulia* on adultery. The law was extended to cover seduction of persons, previously of good character, and sodomy.<sup>12</sup>

(3) The *lex Cornelia* on homicide, including the practice of magic.<sup>13</sup>

(4) The *lex Pompeia* on parricide. Parricide was the murder of a blood kinsman, and the penalties were intensified.<sup>14</sup>

(5) The *lex Cornelia* on forgery.<sup>15</sup>

(6) The *lex Iulia* on violence. Any assault or robbery accompanied by force came within the penalties of this very general statute.<sup>16</sup>

(7) The *lex Iulia* on embezzlement. This was particularly directed against the embezzlement of public moneys.<sup>17</sup>

(8) The *lex Fabia* on kidnapping.<sup>18</sup>

(9) The *lex Iulia* on bribery.<sup>19</sup>

By special statutes, the *lex Remmia* and the *senatus consultum Turpilianum*, false accusation, blackmail, or corrupt practices generally in the conduct of prosecutions, were made crimes, and the punishment left to the discretion of the magistrates.<sup>20</sup>

<sup>11</sup> Most of these statutes are referred to in I. 4, 18, 3-11, and on most of them the Digest has special titles. The *Lex Iulia* on treason is discussed, D. 48, 4; C. 9, 8.

<sup>12</sup> D. 48, 5; C. 9, 9.

<sup>13</sup> D. 48, 8; C. 9, 16.

<sup>14</sup> D. 48, 9; C. 9, 17.

<sup>15</sup> D. 48, 10; C. 9, 22.

<sup>16</sup> D. 48, 6; 48, 7; C. 9, 12.

<sup>17</sup> D. 48, 11; C. 9, 27.

<sup>18</sup> D. 48, 15; C. 9, 20.

<sup>19</sup> D. 48, 13; C. 9, 28; 9, 29.

<sup>20</sup> D. 48, 16; C. 9, 45.

There were a number of offenses which did not come within any specific statute, but which were created by special rescript or edict. These were generally left to the extraordinary cognition of the magistrates (*supra*, § 30), sometimes with determined, and sometimes with undetermined, punishment. A special example of this was fraud—*stellionatus*—which was not a *publicum indicium*, since only the injured person could be the accuser, and the punishment was left to the magistrate's discretion. It was a very elastic term, and was consciously applied when a deliberate wrong was committed, which could not be brought under any other category. Conspiracy and fraudulent destruction of property were particular examples of offenses punished as *stellionatus*.<sup>21</sup>

It will be noted that larceny is not included in the list of punishable crimes. It is evident, however, that larceny accompanied with violence would come under the *lex Iulia de vi* "on violence." Ordinarily, if the theft was by stealth, the civil penalties were adequate, and were apparently the only ones demanded. Yet, if the theft took place at night, it became a criminal offense, as also if the theft had been committed in a public bath. Further, a thief who defended himself with a weapon, even if he struck no one, was equally subject to criminal prosecution.

These last cases were subject to the extraordinary cognition, and with them pickpockets and burglars, even if they avoided the penalties of the *lex Iulia de vi*.<sup>22</sup>

<sup>21</sup> D. 47, 20; C. 9, 34.

<sup>22</sup> D. 47, 17, 1; 47, 17, 2.

## THE UNDERLYING PRINCIPLES

180. Most of the safeguards against oppression were embodied in maxims which were frequently cited. The general attitude was theoretically far more humane than all but the most modern systems. In practice, the system depended for its character on the personality of the magistrates.

If we were to be guided only by the general expressions used in the Digest and Code, the rights of accused persons were fairly well safeguarded. False accusation, as has been seen, was itself a serious crime. Torture was not used, except to obtain evidence from slaves, and many conditions and qualifications were imposed to prevent abuse of this type of "question."<sup>23</sup> Further, in a rescript of Trajan, the principle was set up that it was better that a crime be left unpunished than that an innocent man be condemned.<sup>24</sup> Provisions were made for speedy trials.<sup>25</sup> Only overt acts were punishable. Thoughts could not be made a crime. *Cogitationis pœnam nemo patitur*.<sup>26</sup> And finally the general rule was adopted that penal laws were to be strictly construed in favor of the accused.<sup>27</sup>

All these excellent principles, however, depended for their realization on the manner in which they were applied.<sup>28</sup> It was

<sup>23</sup> D. 48, 18; C. 9, 41.

<sup>24</sup> D. 48, 19, 5, pr.

<sup>25</sup> C. 9, 44.

<sup>26</sup> D. 48, 19, 18.

<sup>27</sup> D. 48, 19, 42.

<sup>28</sup> Many of the rules of our "bills of rights" were maintained at Roman law as general principles. Statutes were not to be retroactive, C. 1, 14, 7. Cf., also, St. Ambrose, *De Abraham Patriarcha* (*Corpus Juris Canonici*, causa 32, quæst 4, can. 3). A form of double jeopardy was forbidden. D. 48, 2, 14. Indeed, the famous maxim, "Every man's house is his castle," cited by Coke, 5 Rep. 92, and generally regarded as a peculiarly English privilege, comes directly from the Roman law. *Nemo de domo sua extrahi debet*, D. 50, 17, 103.

almost inevitable that in a bureaucratic state, such as the later Empire, mechanical routine must have frustrated much of the admirable spirit that underlies these rules. A rational system of treating crimes cannot be said to have been achieved, even at the present day. But it will be noted that the criminal systems of all modern states, including England, until the nineteenth century, were far more rigid and less humane than the Roman system adopted by the *Corpus Iuris*.

## CHAPTER 27

## THE STUDY OF THE ROMAN LAW

## Section

- 181. The Influence of the Roman Law.
- 182. Contact of Roman and Common Law.
- 183. The Study of the Roman Law.
- 184. Manuals of Roman Law.
- 185. The Sources for the Study of Roman Law.

## THE INFLUENCE OF THE ROMAN LAW

181. The Roman law is the basis of most modern systems of law, and has profoundly influenced the Anglo-American system.

The violent controversies that have taken place as to the extent to which a study of Roman law is necessary need not concern us. On the Continent the basic importance of Roman law for the various existing systems is not likely to be forgotten. But the importance is tending to become a purely historical one, as the modern Codes become more and more fully adjusted to present economic conditions.

In common-law countries the Roman Law can never have either the practical or the historical importance which it has in other countries. There was never so large a "reception" of it in England as there was elsewhere. Switzerland also never received the Roman law as the general law of the federated cantons; but the teaching of law in Swiss schools during the last centuries was largely a teaching of Roman law, and Swiss doctrine, if not Swiss legislation, became thoroughly Romanized.

In England, also, very considerable influence was exercised by the Roman law. It would probably be impossible to trace the streams of that influence with absolute precision. But in the following list an attempt has been made to enumerate the points



at which the Roman and English systems were actually in historical contact. It would doubtless be easy to add others, and it need scarcely be noted that the nature and force of the contact varied enormously at the different periods here mentioned.

### CONTACT OF ROMAN AND COMMON LAW

182. At various times, and to various degrees, Roman law ideas were taken into the English system. No conscious opposition between the two existed, except for a brief period in the sixteenth and seventeenth centuries.

#### Influence of Roman Law in English Law:

- (1) Faint traces of Roman Law are found in pre-Norman law due to the influence of the church.
- (2) Some Norman institutions were already tinged with Roman ideas when introduced into England.
- (3) Direct influence of Justinian's codification is met with from 1150 on. Vacarius teaches in England, probably in Oxford. Most judges are ecclesiastics trained in Common and Civil Law.
- (4) Bracton's book (1250) was largely influenced by Roman models, e. g., Institutes, the early medieval Romanists (Azo), etc.
- (5) Edward I (1290) strongly encourages the Roman law. Tendency to consider the Roman law a supplementary common law.
- (6) Certain courts, the Ecclesiastical and the Admiral's Court, practice a modified Roman law.
- (7) The mercantile courts use the West Mediterranean maritime law, which is largely infused with Roman elements.
- (8) The teaching of civil law at the Universities, and the large number of English students at the foreign schools, Paris, Bologna, Montpellier, gave a continuous vehicle for the entrance of Romanist legal ideas.

(9) Deliberate attempt of Yorkist and early Tudor kings to "receive" the Roman law. To this there was a popular and professional opposition, as indicated in Fortescue's *De laudibus legum Angliæ*.

(10) Reaction became stronger under Elizabeth and culminated in Coke's violent diatribes.

(11) Renewal of interest in "natural law," as revised by Grotius (1625), had large effect in England. Hobbes, Locke, and Selden frequently used the concept with all its Roman illustrations.

(12) French "natural law" civilians, such as Domat (seventeenth century), were translated and much quoted; also the German Puffendorf.

(13) Natural law—and the Roman law which was held to embody it best—widely discussed in eighteenth century. Burlamaqui's treatise. Holt, Mansfield, and other judges go directly to Roman sources. Blackstone's frequent references. Pothier, leading French jurist of eighteenth century, treated in England as authority.

(14) In American law the influence of Kent's Commentaries and decisions, and especially of Story, introduced a great many Roman legal ideas. There is also the more limited extension of specific civil law institutions, e. g., some elements of community property and Western land law, and finally, in the Field Code, some provisions and classifications are of Roman origin.

## THE STUDY OF THE ROMAN LAW

183. The study of the Roman law in modern times is to be dated from the rise of the school at Bologna in the twelfth century. The material for the study is largely in languages other than English.

Not only has the Roman law a history which has been briefly sketched in Chapter 2, but the study of the Roman law itself has a long history, which is almost as old. Particularly, since

the rise of the Bolognese Law School in the twelfth century, the teaching and investigation of Roman law has occupied the attention and interest of successive generations of great men. After the introduction of better historical methods by Savigny, early in the nineteenth century, the literature on the subject becomes enormous, and it is not too much to say that every first-rate legal mind in Europe since that time in some way contributed to the comprehension and exposition of Roman law.

To that study men of English speech have made relatively slight contribution. Colleges were founded at Oxford and Cambridge, primarily for the study of the civil law, that is, the Roman law; but those trained in these colleges had a practical career in mind, the Ecclesiastical bar. Some interest in Roman law studies was maintained by classical scholars, but it was not until the latter half of the nineteenth century that works of real value in English appeared in this field.

## MANUALS OF ROMAN LAW

### 184. A very brief selection of the thousands of books on the subject.

An adequate study of Roman law for those who command only English is extremely difficult. That it can be undertaken at all is largely due to several books of Professor W. W. Buckland of Cambridge University. His larger work, *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge, 1921), is admirable alike for its originality, its completeness, and its arrangement. His shorter *Manual of Roman Private Law* (Cambridge, 1925) gives much of this material in condensed form.

Of manuals in other languages, there is, first of all, the indispensable work of Paul Frédéric Girard, *Manuel de Droit Romain* (7th edition, 1924). A small part of the introductory portion is available in English, but a complete translation is still one of the great desiderata in this field. In German, Sohm's *Institutionen des Römischen Privatrechts* is much briefer, and more of an

introductory handbook, but has great merits of form and content. A seventeenth edition, revised by Ludwig Mitteis, was published after Mitteis' death by Leopold Wenger, in 1923. An excellent English translation by Ledlie, from the eighth and ninth German editions, is itself in a third edition.

Other valuable manuals are Cuq. *Manuel des Institutions Juridiques des Romains* (2d edition, 1917), an abridgment of his *Institutions Juridiques des Romains* (2d edition, 1914); Roby's *Roman Private Law*, two volumes (Cambridge, 1902), and Bonfante, P., *Istituzioni di Diritto Romano* (8th edition, Rome, 1925); *Corso di Diritto Romano* (Rome, 1925); P. Collinet and A. Giffard, *Precis de Droit Romain* (Paris, 1926); Paul Jörs, *Römisches Recht in Kohlrausch-Kaskel Enzykl.* (Berlin, 1927); V. Arangio Ruiz, *Istituzioni di Diritto Romano* (Milan, 1923);

For the history of Roman law, the following may be mentioned:

(1) James Muirhead, *Historical Introduction to the Private Law of Rome*, originally revised by Professor Goudy, of Oxford. A third edition, revised by Alexander Grant, appeared in 1916.

(2) L. D. Clark, *Roman Private Law*, three volumes, Cambridge, 1914.

(3) Cornil, *Aperçu Historique: Droit Romain*, Brussels, 1921.

(4) J. Declareuil, *Rome et l'Organisation de Droit*, Paris, 1924.

(5) E. Costa, *Storia di Diritto Romano*, Torino, 1911.

(6) Robert von Mayr *Römische Rechtsgeschichte*, four volumes, in seven parts (Goeschen Series) Leipzig, 1912.

Kübler, B. *Geschichte des Rom. Rechts*, and especially De Francisci, Pietro, *Storia di Diritto Romano*, vol. I, Rome, 1926, are indispensable for a knowledge of modern methods of research.

## THE SOURCES FOR THE STUDY OF THE ROMAN LAW

185. These are nearly all in Latin:

- (1) The *Corpus Iuris Civilis*.
- (2) The few considerable portions of Roman law writers found outside the *Corpus*, collected in the *Collectio librorum iuris anteiustiniani*.
- (3) Inscriptions and papyri giving original documents, collected in *Fontes* (Bruns, Girard, Riccobono).
- (4) Ancient non-legal writers in Greek and Latin.

A real examination of the Roman law is possible only by a study of the actual sources. These are chiefly in Latin, and have been only partly translated into English, although practically complete translations into German and French are readily accessible. The Latin of the texts is not excessively difficult, although there are many passages which tax all the resources of commentators and scholars.

The first of all the sources is, of course:

(1) *Corpus Iuris Civilis*, consisting of Digest, Institutes, Code, and Novels. The commonest edition is the Berlin edition of Mommsen-Krüger—volume 1, Digest and Institutes; volume 2, Code; volume 3, Novels—by Schoell-Kroll. A new edition, indicating the interpolations, is now being issued.

No complete translation of the *Corpus Iuris* exists in English. The Code and the Novels have never been translated at all. Of the Digest, the first fifteen of the fifty books were translated by Mr. C. H. Monroe, (Cambridge, volumes I, II, 1909), and the project of a complete translation was interrupted by his untimely death.

The Institutes have often been translated and commented upon by English writers. Two editions, with translations and copious commentary, may be mentioned:

- (a) T. C. Sandars. Institutes of Justinian (7th edition, 1898).



(b) J. B. Moyle, *Imperatoris Iustiniani Libri Quattuor*, volumes I and II (5th edition, Oxford, 1912).

(2) *Basilica*. A Greek revision of the entire *Corpus*, fusing Code, Institutes, Digest, and Novels, and rearranging most of the material, was made in the ninth and tenth centuries. It contains a great deal of material later than the *Corpus*, but must often be consulted on doubtful passages. Edited by G. Heimbach, six volumes, 1870, and completed by C. Ferrini, 1897.

(3) *Institutes of Theophilus*. A Greek paraphrase of the Institutes of Justinian, prepared almost at the same time as the latter. Edited by C. Ferrini (1884).

(4) The Theodosian Code (cf. *supra*, § 33). An imperfect copy of this Code, as well as of the Post-Theodosian Novels (*supra*, § 33), is found in the *lex Romana Visigothorum*. The most recent edition is that of Mommsen-Meyer, 2 volumes, 1905.

(5) The Institutes of Gaius. Most of this famous book was recovered in a single manuscript in the nineteenth century. An epitome had been known before. More recently an expanded summary was discovered at Autun, which has somewhat assisted the reconstruction of the text where it was faultiest.

A number of English translations and commentaries of Gaius' Institutes exist. The fullest is J. Poste, *Gai Institutiones Iuris Civilis*, 4th edition, Oxford, 1904. Further, there is J. Muirhead, *The Institutes of Gaius*, Edinburgh, 1880.

(6) The fragments of other Roman lawyers not found in the *Corpus*. Some of these, like the Rules of Ulpian, are found in a separate manuscript. Others, like the Sentences of Paul, are known in the much abridged and revised form in which they are preserved in the Breviary of Alaric (*supra*, § 36). Besides there are three more considerable collections: (1) *Collatio*, a comparison of separate provisions of the Roman and Mosaic law, of about the fifth century (edited and translated by Hyamson). (2) *Fragmentum Vaticanum*, a collection of citations from Paul, Papinian, Ulpian, and Imperial Constitutions, of about the same century. (3) *Consultatio*, a lengthy reply, with

citations, by a fifth century lawyer to some legal questions put to him.

There are, further, the citations of Roman lawyers in Latin writers of all periods.

All this material has been put together by several modern editors. We may cite the *Collectio librorum iuris ante-iustiniani*, three volumes, and, less completely, Huschke, *Iurisprudentiæ Anteiustinianæ quæ supersunt*, Teubner, Leipzig. Another collection appears in the *Fontes Iuris Romani*, edited by Riccobono, Baviera, and Ferrini, volume II.

(7) The Inscriptions and some papyri, which give laws, documents, and similar original material, are available in several collections:

(a) Bruns, *Fontes Iuris Romani*, 7th edition, by O. Gradenwitz, 1909.

(b) Girard, *Textes de Droit Romain*, 5th Edition, 1923.

(c) Riccobono-Baviera-Ferrini, *Fontes Iuris Romani*, 1909.

(8) Papyri, mostly Greek and nearly all from Egypt, are constantly adding to our knowledge of Roman law. Besides the relatively small number contained in the collections just mentioned, very many legal documents are to be found in the various papyri publications issued in many parts of the world.

(9) The works of non-legal Roman and Greek writers give a great deal of additional material. Some of them are ancient *lexica* like that of Festus; others are by writers with a particular antiquarian bent, like Varro and Aulus Gellius. But most of them have other purposes in view than legal exposition. Cicero's writings, the Republic, the Laws, and chiefly his speeches, are of prime importance. Three of them, the *pro Quinctio*, the *pro Cæcina*, and the *pro Tullio*, are elaborate and extensive pleas on matters of technical private law.

The excerpts from classical authors, which have legal importance, have often been collected separately. That is particularly true of the comic poets, Plautus and Terence, whose casual references are very important, because of the light they throw

on the conditions of the second century B. C., a period that preceded by a century the oldest fragment of the Digest.

To facilitate work in this field a number of dictionaries are in use. Heumann's *Handlexikon* (9th edition, by E. Seckel) is a Latin-German dictionary of the more important sources. A complete Index—i. e., a reference to the occurrence of every word—has recently been made for the Justinian Code by R. v. Mayr, and for the Theodosian by O. Gradenwitz. A similar Index for the Digest, Institutes, and Gaius is slowly being prepared under the auspices of the Savigny Institute at Berlin, and another is announced for all the juristic writers and legal documents mentioned above in sections 6 and 7.

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